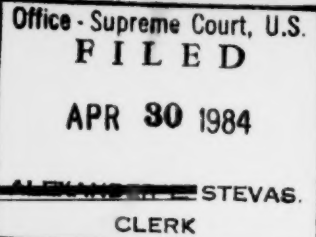


83 - 1762



No. 83- —

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HARRY & BRYANT Co., *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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Andrews Mortuary, Inc.

Dated: April 30, 1984

QUESTION PRESENTED

Petitioners asked the United States Court of Appeals for the Fourth Circuit to set aside as not supported by substantial evidence in the rulemaking record a comprehensive trade regulation rule of the Federal Trade Commission which regulates the affairs of 22,000 individual funeral providers. The Court of Appeals upheld the rule, specifically holding that, "upon reviewing the whole record, we find that there is substantial evidence supporting the Commission's findings and justifying the Rule" and that "after a careful review of the whole record, we conclude that petitioners' challenges are without merit." In fact, however, the rulemaking record was not before the Court because, despite several requests by petitioners pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the record was never transmitted by the Federal Trade Commission.

Under these circumstances the question presented is:

Whether a United States Court of Appeals may properly uphold a trade regulation rule of the Federal Trade Commission as "supported by substantial evidence in the record taken as a whole" without having reviewed, or even received, the rulemaking record?

PARTIES

Petitioners Harry & Bryant Co., Bass-Smith Funeral Home, Inc., Thomas Shepherd & Son, Inc., Warlick Funeral Home, Inc., Jernigan-Warren Funeral Home, Inc., Frank Vogler & Sons, Inc., and Andrews Mortuary, Inc. are seven individual funeral homes who filed petitions in the United States Court of Appeals for the Fourth Circuit to review and set aside a trade regulation rule of the Federal Trade Commission ("FTC") governing the funeral industry. Respondent FTC was the respondent below.*

* Several parties who sought review of the Rule in the Court of Appeals are not parties to this petition and, pursuant to Rule 19.6 of this Court, are, as a technical matter, respondents here. These parties are: National Selected Morticians, The Greater Cincinnati Funeral Service Association and Hanes-Lineberry Funeral Service.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83—

HARRY & BRYANT CO., *et al.*,
v. *Petitioners,*

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action on January 12, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been officially reported but appears at 1984-1 Trade Cas. (CCH) ¶ 65,805 and is reprinted in the Appendix to this petition at 1a-18a. The trade regulation rule of the Federal Trade Commission which was the subject of the proceedings before the Court of Appeals is found at 16 C.F.R. Part 453 and is reprinted in petitioners' Appendix at 23a-38a.¹

¹ The Rule was accompanied by a lengthy statement of basis and purpose which appears at 47 Fed. Reg. 42260-42304 (Sept. 24, 1982). Although the statement of basis and purpose is required by statute, 15 U.S.C. § 57a(b)(1)(D) (1982), the statute also provides that the

JURISDICTION

The decision of the Court of Appeals was entered on January 12, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 1, 1984. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND RULES INVOLVED

Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975 ("Magnuson-Moss Act"), 15 U.S.C. § 57a (1982), constitutes the FTC's exclusive rulemaking power with respect to unfair or deceptive acts and practices and provides that the FTC "may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices."² 15 U.S.C. § 57a(a)(1)(B) (1982). In addition, the Act provides that an FTC trade regulation rule may not be sustained on judicial review unless "supported by substantial evidence in the . . . record . . . taken as a whole." 15 U.S.C. § 57a(e)(3)(A) (1982). For purposes of judicial review, the "record" includes the rule, the FTC's statement of basis and purpose, the transcript of hearings, and any written submission or other information deemed relevant by the FTC. 15 U.S.C. § 57a(e)(1)(B) (1982).

The filing of the FTC's rulemaking record with the Court is governed, *inter alia*, by Rule 17(b) of the Federal Rules of Appellate Procedure which provides that, notwithstanding a prior stipulation to file a certified list of the contents of the record in lieu of the record,

contents and adequacy of the statement of basis and purpose are not subject to judicial review. 15 U.S.C. § 57a(e)(5)(C) (1982). For the convenience of the Court, petitioners have lodged ten copies of the statement of basis and purpose with the Office of the Clerk.

² The full text of Title II of the Magnuson-Moss Act is in the Appendix at 39a-52a.

"[u]pon the request of the court or the request of a party, the record or any part thereof . . . shall be transmitted to the court. . . ." ³

STATEMENT OF THE CASE

On August 29, 1975, the FTC published a notice of proposed rulemaking concerning funeral industry practices. 40 Fed. Reg. 39901. Over 9000 separate comments were received. Following publication of the final notice of proposed rulemaking, 41 Fed. Reg. 7787 (Feb. 20, 1976), the FTC held 52 days of evidentiary hearings at which 315 witnesses presented testimony. There were 14,719 pages of transcript and an additional 4000 pages of exhibits. See 47 Fed. Reg. 42261-62 (Sept. 24, 1982).

At the hearings, opponents of the proposed Rule were precluded in a variety of ways from developing a full

³ Rule 17(b) provides in full:

Rule 17. Filing of the Record

(b) Filing—What Constitutes. The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

and accurate record. Thus, hundreds of interested persons opposed to the proposed Rule were denied the opportunity to testify. In addition, the Presiding Officer received in evidence hundreds of complaints from consumers whose names and addresses had been masked by the FTC staff, thereby precluding opponents of the Rule from rebutting this category of evidence. Finally, following the close of the evidentiary hearings, and the expiration of the rebuttal period, the FTC staff supplemented the record without notice to interested parties by inserting over 700 additional exhibits.

On July 28, 1982, six years after the close of evidentiary hearings, the FTC by a 3-1 vote approved a final Rule. The Chairman of the FTC and the Directors of the FTC's Bureaus of Consumer Protection and Economics, the two bureaus responsible for the Rule, recommended that the Rule not be promulgated because it was not supported by substantial evidence.⁴

The Rule, which is the first federal attempt at regulating an industry that has historically been subject to extensive state and local supervision, constitutes a comprehensive code of conduct governing every provider of funeral goods and services (22,000) and every funeral transaction (2 million annually) in the United States. The FTC's avowed purpose in promulgating the Rule was to effect major changes in the way the funeral industry operates. As the Director of the FTC's Bureau of Consumer Protection stated when the rule was promulgated, the rule seeks "to alter the industry significantly." Thus, the rule:

1. Requires every funeral provider to adopt a single pricing method under which it must separately

⁴ Separate Statement of Honorable James C. Miller, III, Chairman, Federal Trade Commission, 47 Fed. Reg. 42303 (Sept. 24, 1982); Memorandum of Timothy J. Muris, July 16, 1982 (C.A. App. 1829-1866); Memorandum of Bob Tollison, July 20, 1982 (C.A. App. 1867-1871).

price and offer for sale seventeen types of individual goods and services specified by the FTC, 16 C.F.R. §§ 453.2(b)(2)-(4) (26a-30a);

2. Requires every funeral provider affirmatively to disclose detailed price information over the telephone in response to requests, 16 C.F.R. § 453.2(b)(1) (26a);
3. Requires every funeral provider to make twelve detailed, affirmative written statements to consumers with no variation from the specific language mandated by the FTC, 16 C.F.R. §§ 453.3(a)(2)(ii); 453.2(b)(4)(i)(D); 453.2(b)(4)(iii)(A)(1); 453.2(b)(4)(iii)(B)(1); 453.2(b)(4)(iii)(C)(1); 453.2(b)(4)(iii)(C)(2); 453.3(b)(2); 453.3(c)(2); 453.3(f)(2); 453.4(b)(2)(A); 453.4(b)(2)(B); 453.5(b) (26a-36a); and
4. Requires every funeral provider that arranges direct cremations to provide an "unfinished wood box" or alternative container to consumers. 16 C.F.R. § 453.4(a)(2). (35a.)

The apparent evidentiary basis for a Rule of such breadth is a collection of over 70 methodologically flawed "surveys" and the anecdotal testimony of various individual witnesses. Because the "surveys" were not conducted in accordance with accepted principles of survey research, they suffered from numerous admitted methodological deficiencies which rendered them unreliable and incapable of generalization to the industry as a whole. 47 Fed. Reg. 42269 n. 98 (Sept. 24, 1982). As the Director of the Bureau of Consumer Protection stated: "In general, no survey or combination of surveys support the rule as a whole, or any of its major components." (C.A. App. 1833.) Similarly, the non-survey evidence adduced in support of the Rule consisted largely of the testimony or unexamined comments of individual consumers which were vague, ambiguous, biased or based on hearsay and which, at best, were so limited in their reference as

to constitute an insufficient evidentiary basis "to support a nationwide, industry-wide regulation, particularly one such as this that is intended to work a dramatic change in the way the industry works." (C.A. App. 1833-84.)

PROCEEDINGS BELOW

A. Petitioners' Judicial Challenge

In view of the inadequacy of the record and the severity of penalties for violating this lengthy and complicated Rule,⁵ petitioners filed timely petitions in the United States Court of Appeals for the Fourth Circuit seeking review of the Rule.⁶ 15 U.S.C. § 57a(e)(1)(A) (1982). Petitioners argued that the rule and its various provisions were not supported by substantial evidence in the record taken as a whole. Petitioners' evidentiary arguments were wide-ranging and detailed. Petitioners demonstrated the pervasive flaws in the general quality of the record evidence claimed to support the Rule. They also challenged the substantiality of the specific evidence alleged to support the basic factual conclusions and assumptions on which the Rule was based. Finally, petitioners challenged the adequacy of the record evidence claimed to support the individual provisions of the Rule.

B. The Treatment of the Record

Petitioners and the FTC initially agreed to file a certified index of the record with the Court of Appeals in lieu of transmitting the full record. However, in order to permit the Court to evaluate the inadequacy of the

⁵ Violations of the Rule are punishable by a penalty of up to \$10,000 for each violation or day of violation. 15 U.S.C. § 57a(d)(3) (1982).

⁶ Similar petitions filed in other Courts of Appeals were consolidated in the Court of Appeals for the Fourth Circuit for uniform disposition. Accordingly, if not set aside, the decision below represents a final affirmance of the Rule for the entire funeral industry.

evidentiary record, petitioners requested the FTC, pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2112 (1982), to transmit the record to the court prior to oral argument. (53a-54a.) Although the FTC was agreeable (55a-56a and 59a-60a), the Court of Appeals directed that the record remain at the FTC until oral argument but that counsel could then ask the court "to require transmission of the entire record or specific parts thereof to the court." (57a-58a.) Following oral argument, counsel for petitioners requested that the Court of Appeals direct the transmission of the entire record to the court. (61a.) There was no objection by any other party. To the best of petitioners' ability to determine, the court never directed the FTC to transmit the record for review, and the record was not before the court during the panel's deliberations.⁷

C. The Court of Appeals' Decision

On January 12, 1984, a panel of the Court of Appeals affirmed the Rule. Although the administrative record was not before the court, the panel ruled that each of the provisions of the Rule was supported by substantial evidence in the record. (13a-16a.) The panel concluded that, "[u]pon reviewing the whole record, we find that there is substantial evidence supporting the Commission's findings and justifying the Rule. . ." (16a) and that "after a careful review of the whole record, we conclude that petitioners' challenges to the Funeral Rule are without merit."⁸ (18a.)

⁷ The Docket Sheet of the Court of Appeals, a certified copy of which has been lodged with the Clerk of the Court, indicates that no part of the administrative record was transmitted to the Court of Appeals.

⁸ In one scant paragraph, the panel also concluded that the FTC acted within the scope of its authority when it promulgated the

In timely fashion, petitioners sought a rehearing urging, among other things, that the panel could not properly affirm the Rule as supported by substantial evidence in the record without having the record before it. Petitioners' request for a rehearing was denied, without explanation, on March 1, 1984. (19a-22a.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should grant the petition and reverse the judgment of the Court of Appeals because, in failing to review the rulemaking record, the Court of Appeals so far departed from the usual course of judicial procedure that it was unable to, and did not, perform the critical function of reviewing the substantiality of evidence in support of the challenged Rule.

The failure of the Court of Appeals to review the record presents a question of exceptional importance concerning the proper role of federal courts in reviewing the actions of federal administrative agencies. A host of federal statutes, including the Administrative Procedure Act, provide for judicial review of a wide range of administrative action under a substantial evidence standard. If courts charged by Congress with the responsibility to review administrative action under this standard are free to ignore the agency record, judicial review of administrative action will cease to be effective and parties subject to such administrative action will be deprived of the protection of judicial review contemplated by Congress.

rule because the rule technically conformed to the requirements of Section 18 of the Magnuson-Moss Warranty-FTC Improvements Act, 15 U.S.C. § 57a(a)(1)(B) (1982), which permits the FTC to prescribe "rules which define with specificity acts or practices which are unfair" and "requirements prescribed for the purpose of preventing such acts. . . ." (12a.)

A. The Court of Appeals' Failure to Review the Administrative Record Was Clearly Erroneous

The Magnuson-Moss Act provides that an FTC trade regulation rule may not be sustained on appeal unless it is supported "by substantial evidence in the . . . record . . . taken as a whole." 15 U.S.C. § 57a(e)(3)(A) (1982). Petitioners vigorously challenged the substantiality of the record evidence in support of the Rule. Just as vigorously, respondent Federal Trade Commission defended the substantiality of that evidence.

By not having the administrative record before it, the Court of Appeals was unable to perform its proper reviewing function which required it to examine the evidence in the record. In determining whether a rule is supported by substantial evidence in the record, a court must not only examine the evidence in support of the rule but also the evidence which fairly detracts from it. As the Supreme Court has stated, "[t]his is clearly the significance of the [statutory] requirement . . . that courts consider the whole record." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In reviewing the record, the court must engage in a substantial inquiry into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 at 415, 416 (1971). Clearly, actual review of the evidence in the record is the essence of the Court of Appeals' function when, as here, an administrative action is challenged as not supported by substantial evidence in the record.⁹ *RCA v. United States*, 341 U.S. 412, 414-15 (1951).

⁹ As the House Judiciary Committee stated in describing the provision of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(E) (1982) which requires that certain agency action must be supported by substantial evidence: "In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party." Legislative History of the Administrative Procedure Act at 279 (1946).

Petitioners have the right—and the Court of Appeals has the duty—to have the administrative record before the court. The Federal Rules of Appellate Procedure, promulgated by Order of this Court, Order of December 4, 1967, govern “proceedings in the courts of appeals for review or enforcement of orders of administrative agencies. . . .” Fed. R. App. P. 1. Rule 17 of the Rules of Appellate Procedure applies to the filing of the record with the Court of Appeals in connection with petitions to review administrative action and provides that the agency “shall file the record with the clerk of the court of appeals. . . .” Fed. R. App. P. 17(a). The agency has the option of “filing the entire record” or “such part” of the record as the parties may designate by stipulation, or, instead, a certified list of the contents of the record. Fed. R. App. P. 17(b). If, as was the case here, the parties elect to file a certified list of the contents of the record, the Rule provides that “upon request of the court or *the request* of a party, the record or any part thereof thus retained [at the agency] shall be transmitted to the court notwithstanding any prior stipulation.” *Id.* (emphasis added). *See also* 28 U.S.C. § 2112 (1982).

Here, petitioners twice asked that the record be transmitted to the court. The FTC did not object and took the necessary steps to have the record duplicated for transmission to the court. Contrary to the requirements of Rule 17(b), however, the court directed the FTC to retain the entire record and, to the best of petitioners’ ability to determine, never requested, reviewed or consulted the record before issuing its decision concluding that the FTC’s challenged Rule was supported by substantial evidence in the record.

Because the error of the Court of Appeals is so clear and because it goes to the core of the Court’s decision that the Rule was supported by substantial evidence, summary reversal is appropriate.

B. The Court of Appeals' Refusal to Review the Administrative Record Raises a Question of Central Importance to the Congressional Scheme for Judicial Oversight of the Federal Administrative Process

The Court of Appeals' drastic departure from accepted judicial practice and procedure strikes at the heart of Congress' express statutory scheme to control and oversee much of the federal administrative process. Congress has determined that a wide variety of the rulings, orders and decisions of federal administrative agencies are valid only if supported by substantial evidence in the record. Over 100 provisions of the United States Code currently provide for judicial review of administrative action under a substantial evidence standard.¹⁰

Although a complete analysis of these statutes is not possible here, there can be no doubt as to the importance

¹⁰ A complete list of these provisions is set forth in the Appendix at 62a-69a. A representative sample of actions or determinations of federal administrative agencies which Congress has made subject to substantial evidence scrutiny by the courts includes:

- All administrative rulemakings governed by the procedures of 5 U.S.C. §§ 556 and 557, *see* 5 U.S.C. § 706 (1982);
- All final orders in agency adjudicative proceedings under 5 U.S.C. § 554, *see* 5 U.S.C. § 706 (1982);
- Safety rules of the Consumer Products Safety Commission, 15 U.S.C. § 2060(c) (1982);
- Regulations and testing rules for toxic substances issued by the Environmental Protection Agency, *see* 15 U.S.C. § 2618 (c) (1) (1982);
- Antidumping and countervailing duty orders of the Department of Commerce and related determinations of injury by the International Trade Commission, *see* 19 U.S.C. § 1516a (b) (1) (B) (1982);
- Occupational health and safety standards and enforcement orders issued by the Department of Labor, *see* 29 U.S.C. §§ 655(f) and 660(a) (1982);
- Determinations of agency boards of contract appeals, *see* 41 U.S.C. § 609(b) (Supp. V 1981).

of substantial evidence review to the overall Congressional scheme for judicial supervision of administrative activity. For example, in enacting the Magnuson-Moss Act under which the FTC promulgated the Funeral Rule, Congress recognized the potential breadth of the FTC's substantive rulemaking power and imposed additional procedural requirements and stricter judicial review provisions than would otherwise have been available under the Administrative Procedure Act. Clearly, Congress envisioned a significant supervisory role for courts of appeal sitting to review FTC trade regulation rules under the substantial evidence standard.¹¹ The same could be said for each of the other statutes which provide for substantial evidence review of administrative action.

Although it is not possible to quantify with precision the actual number of administrative orders, rules or decisions which Congress has made subject to judicial review on a substantial evidence basis, it is plainly large.¹²

¹¹ Commenting on existing procedures, the House of Representatives stated:

Your committee believes these rulemaking procedures and this scope of judicial review may be inadequate in some cases where fundamental factual premises of a rule are at issue. Because of the potentially persuasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices," the committee believes greater safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described . . . which we believe to be more appropriate in this context. . . .

H.R. Rep. No. 1107, 93d Cong., 2d Sess. 45-46, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7702, 7727. The House Committee Report went on to state that a challenged "rule would not be affirmed by the Court unless the Commission's action was supported by substantial evidence in the record taken as a whole." *Id.* at 48.

¹² Of course, this does not begin to include the equally diverse and extensive range of administrative action that is subject to

If, as happened here, a Court of Appeals reviewing administrative action under this standard is free to disregard the record, the entire Congressional plan to oversee and place limits upon the action of federal administrative agencies would be placed in jeopardy.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Andrews Mortuary, Inc.

Dated: April 30, 1984

judicial review on a "supported by evidence in the record" test. Such review also requires that the court have the record before it in order to properly discharge its reviewing function.

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APR 30 1984

No. 83-

RENEE L. STEVENS

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OCTOBER TERM, 1983

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Petitioners,
v.

FEDERAL TRADE COMMISSION, *et al.*,
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APPENDIX TO
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Dated: April 30, 1984

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1850

HARRY AND BRYANT Co.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
Amicus Curiae

No. 82-1851

BASS-SMITH FUNERAL HOME, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
Amicus Curiae

No. 82-1852

HANES-LINEBERRY FUNERAL SERVICE,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
Amicus Curiae

2a

No. 82-1853

THOMAS SHEPHERD & SON, INC.,
Petitioner,
v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
_____ *Amicus Curiae*

No. 82-1854

WARLICK FUNERAL HOME, INC.,
Petitioner,
v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
_____ *Amicus Curiae*

No. 82-1855

JERNIGAN-WARREN FUNERAL HOME, INC.,
Petitioner,
v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
_____ *Amicus Curiae*

No. 82-1856

FRANK VOGLER & SONS, INC.,
Petitioner,
v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
_____ *Amicus Curiae*

3a

No. 82-1857

ANDREWS MORTUARY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

and

AMERICAN ASSOCIATION OF RETIRED PERSONS,
Amicus Curiae/R

STATE OF ARIZONA,
Amicus Curiae/R

No. 82-1926

NATIONAL SELECTED MORTICIANS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF NORTH CAROLINA,
Amicus Curiae/P.

CONTINENTAL ASSOCIATION OF FUNERAL
AND MEMORIAL SOCIETIES, INC.,
Amicus Curiae/R.

STATE OF ARIZONA,
Amicus Curiae/R

4a

No. 83-1038

THE GREATER CINCINNATI FUNERAL
SERVICE ASSOCIATION, INC.,
Petitioner,
v.

FEDERAL TRADE COMMISSION,
Respondent.

STATE OF ARIZONA,
Amicus Curiae/R

On Petition for Review of a Decision of the
Federal Trade Commission

Argued: October 6, 1983

Decided: January 12, 1984

Before WINTER, Chief Circuit Judge; HALL and PHILLIPS,
Circuit Judges.

David C. Murchison, P.C. (Robert J. Brookhiser, Jr., Daniel P. Underhill, Howrey & Simon on brief) and Thomas H. Clark (T. Scott Gilligan, Clark & Eyrich on brief) for Petitioners; Ernest J. Isenstadt, Assistant General Counsel (John H. Carley, General Counsel, Howard E. Shaprio, Deputy General Counsel, Joanne L. Levine on brief) for Respondent; (Alfred Miller, Peter N. Greenwald, Miller, Singer, Michaelson & Raives, P.C. on brief) for Amicus Curiae American Association of Retired Persons (Robert K. Corbin, Attorney General, Gary

L. Sheets, Assistant Attorney General, Civil Division on brief) for Amicus Curiae State of Arizona; (Rufus L. Edmisten, Attorney General of North Carolina, H. A. Cole, Jr., Special Deputy Attorney General, John R. Corne, Associate Attorney General on brief) for Amicus Curiae State of North Carolina; (David A. Swankin, Swankin & Turner on brief) for Amicus Curiae Continental Association of Funeral and Memorial Societies, Inc.

HALL, Circuit Judge:

Pursuant to Section 18(e) of the Federal Trade Commission Act ("the Act"), 15 U.S.C. § 57a(e), petitioners, Harry & Bryant Company and other providers of funeral services, seek direct review of the Federal Trade Commission Trade Regulation Rule on Funeral Industry Practices ("the Funeral Rule" or "the Rule"). After a thorough consideration of the record of the rule-making proceeding, the briefs, and the oral argument, we find that (1) petitioners were provided all the procedural rights to which they were entitled during the rule-making proceeding, (2) the Rule falls within the Federal Trade Commission's ("FTC"'s) rulemaking authority, (3) the Rule is supported by substantial evidence, and (4) the Rule does not violate petitioners' First Amendment rights. We, therefore, affirm the Rule in its entirety.

I. THE RULEMAKING PROCEEDING

In 1972, the FTC began an investigation of funeral practices across the nation. As a result of this investigation, the Commission initiated a rulemaking proceeding to regulate the funeral industry. The Commission published a notice containing the text of a proposed rule, a statement of the Commission's reasons for issuing it, and an invitation for public comment. Hearings were scheduled to take place in six cities during 1976.

In response to the FTC's notice, more than 9000 documents, comprising in excess of 20,000 pages, were submitted by interested parties, including consumers and industry representatives. During the fifty-two days of hearings 315 witnesses testified. The witnesses also presented exhibits and underwent cross-examination by participating parties or the FTC's Presiding Officer. The hearings generated 14,719 pages of transcripts and approximately 4,000 additional pages of exhibits. Thereafter, another comment period was held for rebuttal of any materials previously admitted into evidence. Forty-seven rebuttal submissions were received.

Following these hearings, the Presiding Officer and Commission staff concluded that existing funeral practices left the consumer vulnerable to unfair and deceptive practices, and that state regulation against deceptive funeral practices was dominated by industry interests. These conclusions were published in 1978, and the Commission allowed ninety days for public comment. Over 1300 separate comments were received. In February, 1979, the staff and the Bureau Director forwarded to the Commission their final recommendations that a rule be promulgated, but with numerous modifications in response to the comments received. In 1980, the Commission voted to publish for public comment a revised version of the Funeral Rule.

A notice containing the revised rule was published in the *Federal Register* on January 22, 1981, and provided for a sixty-day written comment period, followed by a rebuttal period in which parties could respond to the initial round of comments. After expiration of the comment period and following several public hearings in 1981, the Commission made final revisions to the Funeral Rule and submitted it to both Houses of Congress. When Congressional review expired with no resolution of disapproval, the Commission set January 1, 1984, as the effective date of the Funeral Rule. This appeal followed.

II. THE PROPOSED RULE

The proposed rule defines several unfair practices in the sale of funeral goods and prescribes preventive requirements. Following its investigations and public hearings, the Commission concluded that a significant number of funeral providers had engaged in the following unfair practices:

- (1) requiring consumers to purchase "pre-packaged funerals" which might include items consumers would not otherwise buy;
- (2) misrepresenting (a) that the law requires embalming, the purchase of a casket for cremation services, or grave liners and burial vaults; (b) the extent to which funeral goods and services have a preservative and protective value; and (c) whether a mark-up is being charged on "cash advance" items;
- (3) requiring that consumers who wish to arrange for direct cremation services purchase a casket for use in those cremations;
- (4) embalming the bodies of decedents without obtaining authorization; and
- (5) refusing to disclose price information over the telephone.

The rule promulgated by the Commission to address these practices requires that before any discussion of arrangements, funeral providers: (1) give consumers a written list containing prices of funeral goods and services on an itemized basis (although providers may also quote prices on combinations of goods and services); (2) offer price information to consumers who request it over the telephone; (3) obtain permission from a family member before embalming (except under certain designated circumstances); (4) refrain from requiring use of a casket for cremation; (5) refrain from making specified

misrepresentations; and (6) include several short disclosures on the price list informing consumers of their legal rights and purchase options.

III. PROCEDURAL DUE PROCESS

Petitioners complain that they were denied numerous procedural due-process rights during the rulemaking proceeding. We find no merit in any of these challenges.

Petitioners first allege that the Commission violated Section 18 of the Act because the Presiding Officer limited the number of witnesses permitted to give oral testimony and allowed equal numbers of pro-rule and anti-rule witnesses to testify, even though a larger number of anti-rule witnesses had applied. We find that the Presiding Officer's efforts to control the oral hearings in an orderly manner were entirely proper, and caused petitioners no prejudice.

Section 18 does not guarantee every person a right to testify. Furthermore, pursuant to Section 18(c)(2) the right to testify is expressly subordinated to the Commission's authority under Section 18(c)(3) to make rulings for the purpose of avoiding unnecessary costs or delay. Thus, the Presiding Officer was well within his authority in limiting the number of witnesses permitted to give oral testimony.¹

Second, petitioners complain that they were denied their right to cross-examine consumers, whose written complaints were placed on the public record with their names and addresses deleted, and agency staff who prepared reports submitted for the record. We find that this complaint lacks merit.

¹ We are not persuaded by petitioners' suggestion that testimony should have been allowed in proportion to the number of applicants per "side." Such a suggestion fails to consider the quality of testimony or the number of persons a speaker might represent and would permit a trade association to "stack the deck" by producing hundreds of speakers for its point of view.

Section 18 does not provide an automatic right to cross-examine or rebut every comment that is made a part of the rulemaking record. The Presiding Officer was correct in rejecting petitioners' motion on the ground that Section 18 does not contemplate that persons who do not testify be subject to cross-examination. Petitioners showed neither entitlement to cross-examine Commission staff nor substantial prejudice from their inability to do so.

Third, petitioners claim that they did not have proper opportunity to cross-examine and rebut materials placed in the record by FTC staff after the close of the post-hearing rebuttal period. The FTC staff continued to update the record, a practical necessity in lengthy rulemaking proceedings, and ample opportunity was presented for public comments on the new materials. These materials were not made part of the evidentiary record on which the FTC relied in substantiating the Rule. In such circumstances, the FTC's conclusion that cross-examination and rebuttal of such auxiliary materials was inappropriate was clearly permissible.

Fourth, petitioners allege that the Presiding Officer erred in requiring that interested parties give him written questions for consumer witnesses, which he then used to cross-examine those witnesses himself. Petitioners also claim gross prejudice in that the Presiding Officer cross-examined all pro-rule witnesses himself, but allowed opponents of the Rule to examine only anti-rule witnesses. Both of these allegations are meritless.

Section 18(c) (3()) B) of the Act expressly authorizes the Commission to cross-examine witnesses on behalf of interested persons. The Presiding Officer's decision to cross-examine consumer witnesses was a reasonable way to avoid delay. All consumer witnesses, anti-rule and pro-rule, were cross-examined by the Presiding Officer. All other pro-rule witnesses were available for oral cross-examination by petitioners and other rule opponents. Pe-

titioners have not shown any prejudice from this approach.

Fifth, petitioners argue that the Commission abused its discretion by declining to reopen the rulemaking proceeding in July, 1982, to include a study on the accessibility of price information on funeral goods and services. We disagree.

Failure to reopen a record is not an error unless it is an abuse of discretion. Here, the Commission acted well within its discretion in refusing to impose another delay on the Funeral Rule merely to put information, some of which was of questionable reliability, into the rulemaking record.² The Supreme Court has held that to foster administrative finality and prevent litigants from interminably delaying agency action, courts may decline to order reopening of the administrative record because of new facts "except in the most extraordinary circumstances." *Bowman Transp. Co. v. Arkansas-Best Freight System*, 419 U.S. 281, 296 (1974), *reh'g denied*, 420 U.S. 956 (1975). In light of the abundance of information on accessibility of price information already in the record, reopening was clearly not warranted.

Lastly, petitioners contend that the Funeral Rule is procedurally invalid because Commissioner Pertschuk did not disqualify himself from reviewing and voting on the Rule. Petitioners allege that because Commissioner Pertschuk had once been a member of the Board of Directors of the Consumers Union when that organization issued a report critical of the funeral industry and later, while a member of the FTC, had observed publicly that certain characteristics of the funeral transaction created opportunity for consumer exploitation, he should have been precluded from voting on the rule pursuant to *Cinderella Career &*

² Petitioners concede that some "results of the [study] may be subject to challenge."

Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970).³ We find no merit in this argument.

Petitioners' allegation rests upon an effort to subject the rulemaking proceeding to the same standards as adjudicatory proceedings. *Cinderella* and the other cases cited by petitioners all involved the latter. Indeed, the same court that decided *Cinderella* later held "[w]e never intended the *Cinderella* rule to apply to a rulemaking procedure." *Assoc. of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Because rulemaking involves policy decisions and requires an informed decision maker, a member of a rulemaking body should not be disqualified merely because of prior knowledge or opinions on broad policy or legal issues.⁴ *Id.* at 1168-74. The Commissioner Pertschuk's pre-government affiliation with the Consumers Union is also insufficient to disqualify him from voting on the Funeral Rule. *See e.g. Lead Industries Assoc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

Thus, we hold that petitioners were not denied procedural due process.

IV. STATUTORY AUTHORITY AND SUBSTANTIAL EVIDENCE

Petitioners further contend that the Funeral Rule is invalid because it is not within the Commission's statu-

³ Petitioners claim that Commissioner Pertschuk had publicly denounced the funeral industry; yet, in the speech they cite to substantiate this allegation, the funeral industry was only one of over thirty different professions mentioned, and the Commissioner did not dwell on any one occupation.

⁴ Indeed, *National Advertisers* held that Commissioner Pertschuk's strong belief in the need for FTC rules governing television advertising aimed at young children did not disqualify him from the Commission's rulemaking on that subject. 627 F.2d at 1170-75.

tory authority and because it is not supported by substantial evidence. We disagree.

Section 5(a)(1) of the Act, 15 U.S.C. § 45(a)(1), prohibits "unfair or deceptive acts or practices," and Section 18, 15 U.S.C. § 57a()(1), authorizes the Commission to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and "requirements . . . for the purpose of preventing such acts or practices." The Funeral Rule defines unfair practices in the sale of funeral goods and services and prescribes preventive requirements. It clearly falls within the Commission's statutory authority.

An *amicus* brief challenges the legality of any federal rulemaking in an area that the states already regulate. Section 18 does not, however, limit the Commission's rule-making authority to areas previously regulated only by the federal government. Furthermore, Congress explicitly considered this issue, and provided in Section 19(d) of the Federal Trade Commission Improvements Act of 1980 ("Improvements Act"), 15 U.S.C. § 57a, that the existence of state regulation was no barrier to a funeral rule as long as the rule allowed any state to obtain an exemption for its funeral homes by adopting laws that provide protection substantially similar to the federal rule. The Funeral Rule contains such a provision: 16 C.F.R. § 453.9.

Nor are we persuaded by petitioners' claim that the Funeral Rule is invalid because it is not supported by substantial evidence. In characterizing the scope of the substantial evidence test when applied to rulemaking, the Supreme Court defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *American Textile Mfrs. v. Donovan*, 452 U.S. 490, 522 (1981) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Applying that test to this case, we find that the evidence

presented to the Commission is more than adequate to support the Funeral Rule.

The first section of the Rule requires funeral directors to furnish consumers with an itemized list of prices prior to the selection of funeral goods and services. 16 C.F.R. § 453.2(B), (C) (1983). As the record indicates, the majority of directors use some form of combination pricing in selling funeral goods and services. The most common merchandising technique is "unit" pricing in which the consumer is quoted a single price for a complete package of goods and services. This package includes both necessary and unnecessary items which the consumer may or may not want. The evidence establishes that even if consumers ask about alternatives, and seek to avoid paying for specific unwanted items, directors often will not permit them to do so. In addition, a large number of surveys show that the majority of consumers desire pre-sale information about the cost of funeral goods and services, and that many consumers would not select items in a package if told they had a choice.

The Commission concluded that these practices caused substantial consumer injury, which could not be reasonably avoided by consumers, and did not offer corresponding benefits. The section of the Rule proscribing these practices is supported by substantial evidence.

The Rule also requires funeral directors to advise consumers who call to ask about the terms or prices at which funeral goods or services are offered, that price information is available by telephone. 16 C.F.R. § 453.2(B) (1) (1983). Pursuant to the Rule, if consumers ask about prices, directors must provide information from their price lists that reasonably answers the question, or give any other responsive information which is readily available. 16 C.F.R. § 453.2(b) (1) (ii) (1983).

The record shows that both individual consumers and consumer groups complained about difficulties experienced

when they called funeral homes and asked about costs. State surveys included in the record report substantial resistance or flat refusals when survey-takers attempted to gather price data by telephone.⁵

Because funeral arrangements must often be made in haste, and because transfer of the body is impractical once taken to a funeral home, use of the telephone, either in anticipation of death or immediately thereafter, may be the only feasible way to compare prices. The Commission's conclusion that failure to disclose prices over the telephone was an unfair or deceptive act or practice is, therefore, supported by substantial evidence and its proposed remedy is justified.

The second section of the Rule prohibits several deceptions that can occur in a funeral transaction. First, the Rule prohibits misrepresentations of the legal necessity for embalming, and requires funeral directors to disclose that it is not legally required in most cases. 16 C.F.R. § 453.3(a) (1983). The record includes several studies showing that directors routinely embalm the body and charge for the service without obtaining express permission or informing the consumer that embalming is not legally required. There is plainly substantial evidence supporting the Commission's prohibition of this practice.

Second, the Rule forbids misrepresentations that state law requires outer burial containers or that embalming fluids will delay the decomposition of human remains for a long-term or indefinite time. 16 C.F.R. § 453.3(c), (e) (1983). Evidence of such misrepresentations is based upon the testimony of consumers and individuals in the cemetery and casket-making businesses. We find this

⁵ Widespread refusal to disclose price information was virtually conceded during the rulemaking by the National Funeral Directors' Association, which attempted to explain the practice on the grounds that "most" funeral directors fear that disclosure of prices by phone will mislead consumers.

evidence substantial and, therefore, adequate to support the Rule.

Third, the Rule requires that if a funeral director wishes to impose a service charge on a cash advance item he must disclose that fact to the consumer. 16 C.F.R. § 453.3(f) (1983). The record indicates that in California alone, twelve percent of all funeral directors in an industry-sponsored study *acknowledged* that they impose mark-ups on cash advance items or receive a rebate from the supplier which is not returned to the consumer. The record also contains testimony that this practice is common throughout the country. This portion of the Rule is clearly based on substantial evidence.

Fourth, the Rule prohibits funeral directors from requiring a casket for direct cremation, or representing that a casket is required for a direct cremation by state or local law. 16 C.F.R. § 453.3(b); § 453.4 (1983). The Rule states that if funeral providers choose to offer direct cremations, they must make available an unfinished wood box or some other inexpensive container for those consumers who want one, and disclose the availability of this alternative to the consumer.

The record contains a plethora of evidence supporting the necessity of this part of the Rule, including over one hundred consumer complaints, numerous surveys, and the testimony of funeral directors. The evidence indicates that many funeral providers falsely inform consumers that state law requires a casket for direct cremation services and that others simply require caskets to be purchased whenever cremation is desired. Even when funeral providers don't actively mislead consumers, the evidence indicates that they nonetheless frequently fail to provide alternative containers or inform consumers that such containers are available for cremations.

The Commission found that the effect of this practice is to force consumers to purchase caskets. Similarly,

given evidence of widespread consumer ignorance regarding the lack of legal necessity for caskets, it is misleading to offer caskets for cremation without disclosing that legal alternatives exist. We find the evidence presented substantial and, therefore, sufficient to support the Rule.

Lastly, the Rule declares it an unfair practice for a funeral provider to embalm a body unless (1) it is required by state or local law, or (2) express prior approval has been obtained from a family member or another person with the authority to request embalming, or (3) the funeral director is unable to contact a family member or authorized person after exercising due diligence, and has no reason to believe the family does not want the body embalmed. 16 C.F.R. §§ 453.5 (1983).

The record indicates that embalming without express permission is a widespread practice. This fact is generally acknowledged by industry representatives themselves. Although this industry practice may reflect a sincere belief that most consumers desire embalming, even the industry's own study indicates nearly ten percent of the funeral buyers in a given year would decline embalming if allowed to choose. These facts support the Commission's conclusion that failure to obtain express permission for embalming causes considerable consumer injury. We find that the evidence provides a substantial basis for the rule designed to prevent this injury.

Thus, upon reviewing the whole record, we find that there is substantial evidence supporting the Commission's findings and justifying the Rule promulgated to remedy these unfair, and misleading business practices.

V. THE IMPROVEMENTS ACT AND THE FIRST AMENDMENT

Finally, petitioners argue that, even if there is substantial evidence supporting the Commission's conclusions regarding pre-purchase disclosures, the remedy of item-

ized price lists exceeds the Commission's power under the Improvements Act, and violates petitioners' First Amendment rights of commercial free speech. We disagree.

Section 19(c) (1) (B) (i) of the Improvements Act expressly prohibits the FTC from promulgating a regulation except to the extent that it prohibits funeral providers from "engaging in any misrepresentation." The remedy of price itemization is not inconsistent with this limitation. The Commission's conclusion that itemized pricing is necessary to prevent unwanted and unnecessary purchasing is a judgment that is specifically allowed by Section 19(c) (i) (B) (iii). This section stipulates that the Commission may promulgate rules designed to "prevent [funeral] providers from conditioning the furnishing of any such goods or services to a consumer upon the purchase by such consumer of other such goods or services." Section 19(c) (1) (A) also supports the Commission's authority to require the remedy of itemized pricing by establishing that the Commission may require funeral providers "to disclose the fees or prices for such goods and services *in a manner prescribed by the Commission.*" (Emphasis added).

Nor do we agree that the First Amendment prevents the Commission from remedying deception by means of an affirmative disclosure requirement. Assuming that the sales practices in question are commercial "speech," the First Amendment gives that speech no protection when it is misleading, *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), and poses no barrier to any remedy formulated by the Commission reasonably necessary to the prevention of future deception. *American Home Products Corp. v. FTC*, 695 F.2d 681, 713 (3rd Cir. 1982). The practices that the Commission sought to remedy by promulgation of the Funeral Rule were unfair and misleading and thus are not "speech" entitled to First Amendment protection.

VI. CONCLUSION

Thus, after a careful review of the whole record, we conclude that petitioners' challenges to the Funeral Rule are without merit. Accordingly, the Rule is affirmed in its entirety.

RULE AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1850

HARRY AND BRYANT CO.,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,
STATE OF ARIZONA,
Amicus Curiae./R

No. 82-1851

BASS-SMITH FUNERAL HOME, INC.,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,
STATE OF ARIZONA,
Amicus Curiae./R

No. 82-1852

HANES-LINEBERRY FUNERAL SERVICE,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,
STATE OF ARIZONA,
Amicus Curiae./R

20a

No. 82-1853

THOMAS SHEPHERD & SON, INC.,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,
STATE OF ARIZONA,
Amicus Curiae./R

No. 82-1854

WARLICK FUNERAL HOME, INC.,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,
STATE OF ARIZONA,
Amicus Curiae./R

No. 82-1855

JERNIGAN-WARREN FUNERAL HOME, INC.,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,
STATE OF ARIZONA,
Amicus Curiae./R

21a

No. 82-1856

FRANK VOGLER & SONS, INC.,
Petitioner,

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STATE OF ARIZONA,
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No. 82-1857

ANDREWS MORTUARY, INC.,
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FEDERAL TRADE COMMISSION,
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and

AMERICAN ASSOCIATION OF RETIRED PERSONS,
Amicus Curiae./R

STATE OF ARIZONA,
Amicus Curiae./R

22a

No. 82-1926

NATIONAL SELECTED MORTICIANS,
Petitioner,
versus

FEDERAL TRADE COMMISSION,
Respondent,

STATE OF NORTH CAROLINA, . .
Amicus Curiae,/P

CONTINENTAL ASSOCIATION OF FUNERAL
AND MEMORIAL SOCIETIES, INC.,
Amicus Curiae,/R

STATE OF ARIZONA,
Amicus Curiae./R

ORDER

[Filed Mar. 1, 1984]

Upon consideration of the petitioners' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Winter, Judge Hall, and Judge Phillips.

For the Court,

/s/ William K. Slate, II
Clerk

16 C.F.R. Part 453
Funeral Industry Practices

PART 453—FUNERAL INDUSTRY PRACTICES

Ses.

- 453.1 Definitions.
- 453.2 Price disclosures.
- 453.3 Misrepresentations.
- 453.4 Required purchase of funeral goods or funeral services.
- 453.5 Services provided without prior approval.
- 453.6 Retention of documents.
- 453.7 Comprehension of disclosures.
- 453.8 Declaration of intent.
- 453.9 State exemptions.
- 453.10 Mandatory review.

Authority: Sec. 6(g) 38 Stat. 721 (15 U.S.C. 46(g); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552).

§ 453.1 Definitions.

(a) *Accounting year*. “Accounting year” refers to the particular calendar year or other one year period used by a funeral provider in keeping financial records for tax or accounting purposes.

(b) *Alternative container*. An “alternative container” is a non-metal receptacle or enclosure, without ornamentation or a fixed interior lining, which is designed for the encasement of human remains and which is made of cardboard, pressed-wood, composition materials (with or without an outside covering) or pouches of canvas or other materials.

(c) *Cash advance item.* A "cash advance item" is any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement," or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to, the following items: Cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.

(d) *Casket.* A "casket" is a rigid container which is designed for the encasement of human remains and which is usually constructed of wood, metal, or like material, and ornamented and lined with fabric.

(e) *Commission.* "Commission" refers to the Federal Trade Commission.

(f) *Cremation.* "Cremation" is a heating process which incinerates human remains.

(g) *Crematory.* A "crematory" is any person, partnership or corporation that performs cremation and sells funeral goods.

(h) *Direct cremation.* A "direct cremation" is a disposition of human remains by cremation, without formal viewing, visitation, or ceremony with the body present.

(i) *Funeral goods.* "Funeral goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services.

(j) *Funeral provider.* A "funeral provider" is any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.

(k) *Funeral services.* "Funeral services" are any services which may be used to care for and prepare deceased human bodies for burial, cremation or other final

disposition; and arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.

(l) *Immediate burial.* An "immediate burial" is a disposition of human remains by burial, without formal viewing, visitation, or ceremony with the body present, except for a graveside service.

(m) *Outer burial container.* An "outer burial container" is any container which is designed for placement in the grave around the casket including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

(n) *Person.* A "person" is any individual, partnership, corporation, association, government or governmental subdivision or agency, or other entity.

(o) *Services of funeral director and staff.* The "services of funeral director and staff" are the services, not included in prices of other categories in § 453.2(b)(4) which may be furnished by a funeral provider in arranging and supervising a funeral, such as conducting the arrangements conference, planning the funeral, obtaining necessary permits and placing obituary notices.

(p) *Unfinished wood box.* An "unfinished wood box" is an unornamented casket made of wood which does not have a fixed interior lining.

§ 453.2 Price disclosures.

(a) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of re-

mains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.

(b) *Preventive requirements.* To prevent these unfair or deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(b)(1), funeral providers must:

(1) *Telephone price disclosures.* (i) Tell persons who call the funeral provider's place of business and ask about the terms, conditions, or prices at which funeral goods or funeral services are offered, that price information is available over the telephone.

(ii) Tell persons who ask by telephone about the funeral provider's offerings or prices any accurate information from the price lists in paragraph (b)(2) through (4) of this section which reasonably answers the question and any other information which reasonably answers the question and which is readily available.

(2) *Casket price list.* (i) Give a printed or typewritten price list to people who inquire in person about the offerings or prices of caskets or alternative containers. The funeral provider must offer the list upon beginning discussion of, but in any event before showing caskets. The list must contain at least the retail prices of all caskets and alternative containers offered which do not require special ordering, enough information to identify each, and the effective date for the price list. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner. *Provided however*, that funeral providers do not have to make a casket price list available if the funeral providers place

on the general price list, specified in paragraph (b) (4) of this section, the information which is required by this paragraph (b) (2) (i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as a "casket price list."

(3) *Outer burial container price list.* (i) Give a printed or typewritten price list to persons who inquire in person about outer burial container offerings or prices. The funeral provider must offer the list upon beginning discussion of, but in any event before showing the containers. The list must contain at least the retail prices of all outer burial containers offered which do not require special ordering, enough information to identify each container, and the effective date for the prices listed. In lieu of a written list, the funeral provider may use other formats, such as notebooks, brochures, or charts, if they contain the same information as the printed or typewritten list, and display it in a clear and conspicuous manner. *Provided however*, that funeral providers do not have to make an outer burial container price list available if the funeral providers place on the general price list, specified in paragraph (b) (4) of this section, the information which is required by this paragraph (b) (3) (i) of this section.

(ii) Place on the list, whether a printed or typewritten list or other format is used, the name of the funeral provider's place of business and a caption describing the list as an "outer burial container price list."

(4) *General price list.* (i) Give a printed or typewritten price list for retention to persons who inquire in person about funeral arrangements or the prices of funeral goods or funeral services. When people inquire in person about funeral arrangements or the prices of funeral goods or funeral services, the funeral provider must

offer them the list upon beginning discussion either of funeral arrangements or of the selection of any funeral goods or funeral services. This list must contain at least the following information:

(A) The name, address, and telephone number of the funeral provider's place of business;

(B) A caption describing the list as a "general price list";

(C) The effective date for the price list; and

(D) In immediate conjunction with the price disclosures required by paragraph (b) (4) (ii) of this section, the statement: "This list does not include prices for certain items that you may ask us to buy for you, such as cemetery or crematory services, flowers, and newspaper notices. The prices for those items will be shown on your bill or the statement describing the funeral goods and services you selected."

(ii) Include on the price list, in any order, the retail prices (expressed either as the flat fee, or as the price per hour, mile or other unit of computation) and the other information specified below for at least each of the following items, if offered for sale:

(A) Forwarding of remains to another funeral home, together with a list of the services provided for any quoted price;

(B) Receiving remains from another funeral home, together with a list of the services provided for any quoted price;

(C) The price range for the direct cremations offered by the funeral provider, together with: (1) A separate price for a direct cremation where the purchaser provides the container; (2) separate prices for each direct cremation offered including an unfinished wood box alternative container; and (3) a description of the services and container (where applicable), included in each price;

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(D) The price range for the immediate burials offered by the funeral provider, together with: (1) A separate price for an immediate burial where the purchaser provides the casket; (2) separate prices for each immediate burial offered including a casket or alternative container; and (3) a description of the services and container (where applicable) included in that price;

(E) Transfer of remains to funeral home;

(F) Embalming;

(G) Other preparation of the body;

(H) Use of facilities for viewing;

(I) Use of facilities for funeral ceremony;

(J) Other use of facilities, together with a list of facilities provided for any quoted price;

(K) Hearse;

(L) Limousine;

(M) Other automotive equipment, together with a description of the automotive equipment provided for any quoted price; and

(N) Acknowledgement cards.

(iii) Include on the price list, in any order, the following information:

(A) Either of the following:

(1) The price range for the caskets offered by the funeral provider, together with the statement: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual caskets, disclosed in the manner specified by paragraph (b) (2) (i) of this section; and

(B) Either of the following;

(1) The price range for the outer burial containers offered by the funeral provider, together with the state-

ment: "A complete price list will be provided at the funeral home."; or

(2) The prices of individual outer burial containers, disclosed in the manner specified by paragraph (b) (3) (i) of this section; and

(C) Either of the following:

(1) The price for the services of funeral director and staff, together with a list of the principal services provided for any quoted price and, if the charge cannot be declined by the purchaser, the statement: "This fee for our services will be added to the total cost of the funeral arrangements you select. (This fee is already included in our charges for direct cremation, immediate burials, and forwarding or receiving remains.)"; or

(2) The following statement: "Please note that a fee for the use of our services is included in the price of our caskets. Our services include (specify)." The statement must be placed on the general price list together with casket price range, required by paragraph (b) (4) (ii) (A) (1) of this section, or together with the prices of individual caskets, required by (b) (4) (iii) (A) (2).

(5) *Statement of funeral goods and services selected.*

(i) Give an itemized written statement for retention to each person who arranges a funeral or other disposition of human remains, at the conclusion of the discussion of arrangements. The statement must list at least the following information:

(A) The funeral goods and funeral services selected by that person and the prices to be paid for each of them;

(B) Specifically itemized cash advance items. (These prices must be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a good faith estimate shall be given and a written statement of the actual charges shall be provided before the final bill is paid.) ; and

(C) The total cost of the goods and services selected.

(ii) The information required by this paragraph (b) (5) of this section may be included on any contract, statement, or other document which the funeral provider would otherwise provide at the conclusion of discussion of arrangements.

(6) *Other pricing methods.* Funeral providers may give persons any other price information, in any other format, in addition to that required by paragraph (b) (2), (3), and (4) of this section so long as the statement required by paragraph (b) (5) of this section is given when required by the rule.

§ 453.3 Misrepresentations.

(a) *Embalming Provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires that a deceased person be embalmed when such is not the case;

(ii) Fail to disclose that embalming is not required by law except in certain special cases.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in §§ 453.4(b) (1) and 453.5(2) [sic], funeral providers must:

(i) Not represent that a deceased person is required to be embalmed for direct cremation, immediate burial, a funeral using a sealed casket, or if refrigeration is available and the funeral is without viewing or visitation and with a closed casket when state or local law does not require embalming; and

(ii) Place the following disclosure on the general price list, required by § 453.2(b) (4), in immediate conjunc-

tion with the price shown for embalming: "Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement which does not require you to pay for it, such as direct cremation or immediate burial."

(b) *Casket for cremation provisions.* (1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local law requires a casket for direct cremations;

(ii) Represent that a casket (other than an unfinished wood box) is required for direct cremations.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the unfair or deceptive acts or practices defined in § 453.4(a)(1), funeral providers must place the following disclosure in immediate conjunction with the price range shown for direct cremations: "If you want to arrange a direct cremation, you can use an unfinished wood box or an alternative container. Alternative containers can be made of materials like heavy cardboard or composition materials (with or without an outside covering), or pouches of canvas." This disclosure only has to be placed on the general price list if the funeral provider arranges direct cremations.

(c) *Outer burial container provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods and funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that state or local laws or regulations, or particular cemeteries, require outer burial containers when such is not the case;

(ii) Fail to disclose to persons arranging funerals that state law does not require the purchase of an outer burial container.

(2) *Preventive requirement.* To prevent these deceptive acts or practices, funeral providers must place the following disclosure on the outer burial container price list, required by § 453.2(b)(3)(ii), or, if the prices of outer burial containers are listed on the general price list, required by § 453.2(b)(4), in immediate conjunction with those prices: "In most areas of the country, no state or local law makes you buy a container to surround the casket in the grave. However, many cemeteries ask that you have such a container so the grave will not sink in. Either a burial vault or a grave liner will satisfy these requirements."

(d) *General provisions on legal and cemetery requirements.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for funeral providers to represent that federal, state, or local laws, or particular cemeteries or crematories, require the purchase of any funeral goods or funeral services when such is not the case.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, as well as the deceptive acts or practices identified in § 453.3(a)(1), § 453.3(b)(1), and § 453.3(c)(1) funeral providers must identify and briefly describe in writing on the statement of funeral goods and services selected (required by § 453.2(b)(5)) any legal, cemetery, or crematory requirements which the funeral provider represents to persons as compelling the purchase of funeral goods or funeral services for the funeral which that person is arranging.

(e) *Provisions on preservative and protective value claims.* In selling or offering to sell funeral goods or

funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(1) Represent that funeral goods or funeral services will delay the natural decomposition of human remains for a long-term or indefinite time;

(2) Represent that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case.

(f) *Cash advance provisions.*—(1) *Deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is a deceptive act or practice for a funeral provider to:

(i) Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case;

(ii) Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the funeral provider for the item when such is the case.

(2) *Preventive requirements.* To prevent these deceptive acts or practices, funeral providers must place the following sentence in the general price list, at the end of the cash advances disclosure, required by § 453.2(b)(4)

(ii)(C): "We charge you for our services in buying these items," if the funeral provider makes a charge upon, or receives and retains a rebate, commission or trade or volume discount upon a cash advance item.

§ 453.4 Required purchase of funeral goods or funeral services.

(a) *Casket for cremation provisions.*—(1) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider, or a crematory, to require that a casket other than an unfinished wood box be purchased for direct cremation.

(2) *Preventive requirement.* To prevent this unfair or deceptive act or practice, funeral providers must make an unfinished wood box or alternative container available for direct cremations, if they arrange direct cremations.

(b) *Other required purchases of funeral goods or funeral services.*—(1) *Unfair or deceptive acts or practices.* In selling or offering to sell funeral goods or funeral services, it is an unfair or deceptive act or practice for a funeral provider to condition the furnishing of any funeral good or funeral service to a person arranging a funeral upon the purchase of any other funeral good or funeral service, except as required by law or as otherwise permitted by this part.

(2) *Preventive requirements.* (i) To prevent this unfair or deceptive act or practice, funeral providers must:

(A) Place the following disclosure in the general price list, immediately above the prices required by § 453.2(b) (4) (ii) and (iii): “The goods and services shown below are those we can provide to our customers. You may choose only the items you desire. If legal or other requirements mean you must buy any items you did not specifically ask for, we will explain the reason in writing on the statement we provide describing the funeral goods and services you selected.”

Provided, however, That if the charge for “services of funeral director and staff” cannot be declined by the purchaser, the statement shall include the sentence: “However, any funeral arrangements you select will include a charge for our services” between the second and third sentences of the statement specified above herein; and

(B) Place the following disclosure on the statement of funeral goods and services selected, required by § 453.2(b) (5) (ii). “Charges are only for those items that are used. If we are required by law to use any items, we will explain the reasons in writing below.”

(ii) A funeral provider shall not violate this section by failing to comply with a request for a combination of goods or services which would be impossible, impractical, or excessively burdensome to provide.

§ 453.5 Services provided without prior approval.

(a) *Unfair or Deceptive Acts or practices.* In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for any provider to embalm a deceased human body for a fee unless:

(1) State or local law or regulation requires embalming in the particular circumstances regardless of any funeral choice which the family might make; or

(2) Prior approval for embalming (expressly so described) has been obtained from a family member or other authorized person; or

(3) The funeral provider is unable to contact a family member or other authorized person after exercising due diligence, has no reason to believe the family does not want embalming performed, and obtains subsequent approval for embalming already performed (expressly so described). In seeking approval, the funeral provider must disclose that a fee will be charged if the family selects a funeral which requires embalming, such as a funeral with viewing, and that no fee will be charged if the family selects a service which does not require embalming, such as direct cremation or immediate burial.

(b) *Preventive requirement.* To prevent these unfair or deceptive acts or practices, funeral providers must include on the contract, final bill, or other written evidence of the agreement or obligation given to the customer, the statement: "If you selected a funeral which requires embalming, such as a funeral with viewing you may have to pay for embalming. You do not have to pay for embalming you did not approve if you selected

arrangements such as a direct cremation or immediate burial. If we charged for embalming, we will explain why below."

§ 453.6 Retention of documents.

To prevent the unfair or deceptive acts or practices specified in § 453.2 and § 453.3 of this rule, funeral providers must retain and make available for inspection by Commission officials true and accurate copies of the price lists specified in § 453.2(b) (2) through (4), as applicable, for at least one year after the date of their last distribution to customers, and a copy of each statement of funeral goods and services selected, as required by § 453.2 (b) (5) for at least one year from the date on which the statement was signed.

§ 453.7 Comprehension of disclosures.

To prevent the unfair or deceptive acts or practices specified in § 453.2 through § 453.5, funeral providers must make all disclosures required by those sections in a clear and conspicuous manner.

§ 453.8 Declaration of intent.

(a) Except as otherwise provided in § 453.2(a), it is a violation of this rule to engage in any unfair or deceptive acts or practices specified in this rule, or to fail to comply with any of the preventive requirements specified in this rule;

(b) The provisions of this rule are separate and severable from one another. If any provision is determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

(c) This rule shall not apply to the business of insurance or to acts in the conduct thereof.

§ 453.9 State exemptions.

If, upon application to the Commission by an appropriate state agency, the Commission determines that:

(a) There is a state requirement in effect which applies to any transaction to which this rule applies; and

(b) That state requirement affords an overall level of protection to consumers which is as great as, or greater than, the protection afforded by this rule; then the commission's rule will not be in effect in that state to the extent specified by the Commission in its determination, for as long as the State administers and enforces effectively the state requirement.

§ 453.10 Mandatory review.

No later than four years after the effective date of this rule, the Commission shall initiate a rulemaking amendment proceeding pursuant to section 18(d)(2)(B) to determine whether the rule should be amended or terminated. The Commission's final decision on the recommendations of this proceeding shall be made no later than eighteen months after the initiation of the proceeding.

Federal Trade Commission Act, Section 18
(15 U.S.C. § 57a)

§ 57a. Unfair or deceptive acts or practices rulemaking proceedings—Authority of Commission to prescribe rules and general statements of policy

(a) (1) Except as provided in subsection (i) of this section, the Commission may prescribe—

(A) Interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this chapter, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

Procedure applicable

(b) (1) When prescribing a rule under subsection (a) (1) (B) of this section, the Commission shall proceed in

accordance with section 553 of Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e) (1) (B) of this section), together with a statement of basis and purpose.

(2) (A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1) (A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—

(i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives. The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of

inquiry before the publication of a general notice of proposed rulemaking under paragraph (1) (A).

(C) The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1) (A), submit such notice to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

Informal hearing procedure

(c) The Commission shall conduct any informal hearings required by subsection (b) (1) (C) of this section in accordance with the following procedure:

(1) (A) The Commission shall provide for the conduct of proceedings under this subsection by hearing officers who shall perform their functions in accordance with the requirements of this subsection.

(B) The officer who presides over the rulemaking proceedings shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission. The officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence, except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(C) Except as required for the disposition of ex parte matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(2) Subject to paragraph (3) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submissions (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (3) (B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(3) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (2) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

(4) (A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (2) and (3) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and ruling (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination shall be limited.

(B) When any person who is a member of a group with respect to which the Commission has made a

determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(5) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

**Statement of basis and purpose accompanying rule;
"Commission" defined; judicial review of amendment
or repeal of rule; violation of rules**

(d) (1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a) (1) (B) of this section shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

(2) (A) The term "Commission" as used in this subsection and subsections (b) and (c) of this section includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a) (1) (B) of this section shall be prescribed, and subject to judicial review, in the

same manner as a rule prescribed under such subsection. An exemption under subsection (g) of this section shall not be treated as an amendment or repeal of a rule.

(3) When any rule under subsection (a)(1)(B) of this section takes effect a subsequent violation thereof shall constitute an unfair or receptive act or practice in violation of section 45(a)(1) of this title, unless the Commission otherwise expressly provides in such rule.

**Judicial review; petition; jurisdiction and venue;
rulemaking record; additional submissions and
presentations; scope of review and relief;
review by Supreme Court;
additional remedies**

(e)(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

(B) For purposes of this section, the term "rulemaking record" means the rule, its statement of basis and purpose, the transcript required by subsection (c)(5) of this section, any written submissions, and any other information which the Commission considers relevant to such rule.

(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the

court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule's statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706 (2) of Title 5 (taking due account of the rule of prejudicial error), or if—

(A) the court finds that the Commission's action is not supported by substantial evidence in the rule-making record (as defined in paragraph (1) (B) of this subsection) taken as a whole, or

(B) the court finds that—

(i) a Commission determination under subsection (c) of this section that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) of this section limiting the petitioner's cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the

Commission of the rulemaking proceeding taken as a whole.

The term "evidence," as used in this paragraph, means any matter in the rulemaking word.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) (A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

(B) The United States Court of Appeals shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a) (1) (B) of this section, if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3) (B) (i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3) (B). Section 706 (2) (E) of Title 5 shall not apply to any rule promulgated under subsection (a) (1) (B) of this section. The contents and adequacy of any statement required by subsection (b) (1) (D) of this section shall not be subject to judicial review in any respect.

Unfair or deceptive acts or practices by banks or savings and loan institutions; promulgation of regulations by Board of Governors of Federal Reserve System and by Federal Home Loan Bank Board; agency enforcement and compliance proceedings; violations; power of other Federal agencies unaffected; reporting requirements

(f) (1) In order to prevent unfair or deceptive acts or practices in or affecting commerce (including acts or practices which are unfair or deceptive to consumers) by banks or savings and loan institutions described in paragraph (3), each agency specified in paragraph (2) or (3) of this subsection shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks or savings and loan institutions described in paragraph (3) subject to its jurisdiction. The Board of Governors of the Federal Reserve System (with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3)) shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices. Whenever the Commission prescribes a rule under subsection (a) (1) (B) of this section, then within 60 days after such rule takes effect each such Board shall promulgate substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions described in paragraph (3) as the case may be, which are substantially similar to those prohibited by rules of the Commission and which impose substantially similar requirements, unless (A) either such Board finds that such acts or practices of banks or savings and loan institutions described in paragraph (3), as the case may be, are not unfair or deceptive, or (B) the Board of Governors of the Federal Reserve System finds that im-

plementation of similar regulations with respect to banks would seriously conflict with essential monetary and payments systems policies of such Board, and publishes any such finding, and the reasons therefor, in the Federal Register.

(2) Compliance with regulations prescribed under this subsection shall be enforced under section 1818 of Title 12, in the case of—

(A) national banks and banks operating under the code of law for the District of Columbia, by the division of consumer affairs established by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than banks referred to in subparagraph (A)) by the division of consumer affairs established by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)), by the division of consumer affairs established by the Board of Directors of the Federal Deposit Insurance Corporation.

(3) Compliance with regulations prescribed under this subsection shall be enforced under section 5 of the Home Owners' Loan Act of 1933 with respect to Federal savings and loan associations, section 407 of the National Housing Act with respect to insured institutions, and sections 6(i) and 17 of the Federal Home Loan Bank Act with respect to savings and loan institutions which are members of a Federal Home Loan Bank, by a division of consumer affairs to be established by the Federal Home Loan Bank Board pursuant to the Federal Home Loan Bank Act.

(4) For the purpose of the exercise by any agency referred to in paragraph (2) of its powers under any Act referred to in that paragraph, a violation of any regula-

tion prescribed under this subsection shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in paragraph (2), each of the agencies referred to in that paragraph may exercise, for the purpose of enforcing compliance with any regulation prescribed under this subsection, any other authority conferred on it by law.

(5) The authority of the Board of Governors of the Federal Reserve System to issue regulations under this subsection does not impair the authority of any other agency designated in this subsection to make rules respecting its own procedures in enforcing compliance with regulations prescribed under this subsection.

(6) Each agency exercising authority under this subsection shall transmit to the Congress each year a detailed report on its activities under this paragraph during the preceding calendar year.

**Exemptions and stays from application of
rules; procedures**

(g) (1) Any person to whom a rule under subsection (a) (1) (B) of this section applies may petition the Commission for an exemption from such rule.

(2) If, on its own motions or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a) (1) (B) of this section to any person or class or ¹ persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of Title 5 shall apply to action under this paragraph.

(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Com-

mission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a) (1) (B) of this section.

**Compensation for attorney fees, expert witness fees, etc.,
incurred by persons in rulemaking proceedings;
limitation on amount; establishment of
small business outreach program**

(h) (1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, except witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserved amount shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserved amount which is not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed \$1,000,000.

(4) The Commission, in connection with the administration of this subsection pursuant to rule prescribed by

the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and

(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation under such program.

**Restriction on rulemaking authority of Commission
respecting children's advertising proceedings
pending on May 28, 1980**

(i) The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.

Meetings with outside parties

(j) (1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commission to provide any goods or services (including consulting services) to the Commission.

(2) No later than 60 days after May 28, 1980, the Commission shall publish a proposed rule, and not later than 180 days after May 28, 1980, the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside

party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

Communications by investigative personnel with staff of Commission concerning matters outside rulemaking record prohibited

(k) Not later than 60 days after May 28, 1980, the Commission shall publish a proposed rule, and not later than 180 days after May 28, 1980, the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

Sept. 26, 1914, c. 311, § 18, as added Jan. 4, 1975, Pub. L. 93-637, Title II, § 202(a), 88 Stat. 2193, and amended July 23, 1979, Pub.L. 96-37, § 1(c), 93 Stat. 95; Mar. 25, 1980 H.Res. 549; Mar. 31, 1980, Pub.L. 96-221, Title VI, § 610(b), 94 Stat. 174; May 28, 1980, Pub. L. 96-252, §§ 7-9, 10, 11(a), 12, 94 Stat. 376-379.

53a

HOWREY & SIMON
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Robert J. Brookhiser, Jr.
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September 8, 1983

BY HAND

Ernest J. Isenstadt, Esquire
Assistant General Counsel
Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *Harry & Bryant Co., et al. v. FTC*
Nos. 82-1850(L)—82-1857, 82-1926; and *The*
Greater Cincinnati Funeral Service Association,
Inc. v. FTC, No. 83-1038

Dear Mr. Isenstadt:

Confirming our telephone conversation earlier today, pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, petitioners in *Harry & Bryant Co., et al. v. FTC*, request that the FTC transmit the entire record of the proceeding below to the Court of Appeals in Richmond. Because the petitions raise numerous questions concerning the adequacy of the record and the sufficiency of the evidence in support of the FTC's Funeral Rule, petitioners believe that the complete record should be before the Court.

The argument in this matter has been scheduled for October 6. In order that the court may have sufficient opportunity to consult the record in advance of the argu-

ment date, petitioners request that the FTC transmit the record by September 26, 1983.

Sincerely,

/s/ Robert J. Brookhiser
ROBERT J. BROOKHISER

cc: Mr. William K. Slate, II
Robert E. Kopp, Esq.
Alfred Miller, Esq.
David A. Swankin, Esq.
H.A. Cole, Jr., Esq.
Garry L. Sheets, Esq.
Thomas H. Clark, Esq.

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

September 9, 1983

Office of the General Counsel

Mr. William K. Slate, II
Clerk
United States Court of Appeals
for the Fourth Circuit
10th & Main Streets
Richmond, Virginia 23219-3599

Re: *Harry & Bryant Co. et al. v. FTC*, No. 82-1850 (L), 82-1857, 82-1926, 83-1038

Dear Mr. Slate:

On September 8, 1983, the Commission received a request from counsel for petitioners in this case that it transmit the entire record of the proceedings below to the Fourth Circuit by September 26, 1983, pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure. While the Commission believes such a step is unnecessarily burdensome at this stage of the proceedings, it recognizes petitioners' right to request transfer of any or all parts of the record under Rule 17(b). The purpose of this letter is to advise the Court of the size of the record in the event the Court wishes to direct alternative treatment.

The record consists of 151 docket binders, which occupy approximately 50 linear feet of shelf space, or 43 cubic feet if placed in boxes. The binders contain several score thousand pieces of paper, and together weigh approximately one-half ton. Because of the size of this record, it is prohibitively expensive for the Commission to make a copy of it for transmission to the Court. Therefore, the Commission will transmit to the Court the

original record. Thus, during the pendency of the petition for review, the Commission will not have a copy of the record with which to respond to requests for information from the public or the Court. Following the review proceeding, of course, it will be necessary for the Court to return the record to the Commission.

The Commission will arrange to ship the record on or after September 21, 1983. Should the Court for its convenience prefer to direct alternative treatment of the record, please advise me by that date.

Sincerely,

/s/ Ernest J. Isenstadt
ERNEST J. ISENSTADT
Assistant General Counsel

cc: Robert J. Brookhiser, Esq.
Thomas H. Clark, Esq.
H.A. Cole, Jr., Esq.
Alfred Miller, Esq.
Gary L. Sheets, Esq.
David A. Swankin, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Courthouse
Tenth & Main Streets
Richmond, Virginia 23219

William K. Slate, II
Clerk

Telephone
(804) 771-2213
FTS 925-2213

September 14, 1983

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Phoenix, AZ 85007

Re: 82-1850 (L), et al—Harry and Bryant Co., et
al v. Federal Trade Commission

Dear Counsel:

With respect to the proposal that the entire record of the proceeding below be transmitted to this court, and the response thereto by the Federal Trade Commission, the following conclusion has been reached.

Please note the concluding sentence of Rule 17(b) of the Federal Rules of Appellate Procedure which provides, "All parts of the record retained by the agency shall be a part of the record on review for all purposes." The record should be retained in the agency file until the time of oral argument. At that time, counsel may, if they so desire, ask the court to require transmission of the entire record or specific parts thereof to the court. The court can then decide, after argument and during the decisional and opinion drafting process, what part of the record, if any, it needs.

Sincerely yours,

WILLIAM K. SLATE, II

By: /s/ Bert M. Montague
BERT M. MONTAGUE
Chief Deputy Clerk

BMM:jd

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the General Counsel

September 29, 1983

Mr. William K. Slate, II
Clerk
United States Court of Appeals
for the Fourth Circuit
10th & Main Streets
Richmond, Virginia 23219-3599

Re: *Harry N Bryant Co. et al. v. FTC*, Nos. 82-
1850(L)-82-1857, 82-1926, 83-1038

Dear Mr. Slate:

The purpose of this letter is to call to the Court's attention recent developments regarding the effective date of the Funeral Rule and transmission of the record in this case.

1. In response to petitions by the National Funeral Director's Association and the National Selected Morticians, the Commission voted on September 29, 1983, to extend until April 30, 1984, the effective date of all portions of the Rule as to which such extension was requested. The effective date for certain portions of the Rule will remain January 1, 1984, as previously established (see Brief for Respondent, p. 10). A copy of a draft federal register notice extending the effective date, and authorized for imminent publication by the Commission is enclosed.

2. Following my letter to you of September 9, 1983, regarding petitioners' request that the Commission transfer the record in this case, it was determined, contrary to my previous understanding, that the Commission would have funds to make a photocopy of the entire rec-

ord, although that process would take some time. In anticipation that petitioners might wish to renew their request that the record be transferred to the Court, I authorized the Office of the Secretary to proceed with this job, utilizing funds from the Commission's 1983 appropriation.

Duplication of the record has now been completed by a contractor, and employees of the Office of the Secretary are proceeding to check the accuracy of the work. This job should be finally completed by sometime in October. At such time, the Commission will be able, should the Court direct, to transfer to the Court a photocopy of the entire record. The Commission's capacity to send a copy of the record obviates certain concerns that I raised in my letter of September 9 to you. In particular, the Commission will be left with the original record so that members of the public may consult it, and the Court need not assume the burden of preserving the record unaltered or returning it to the agency.

For these reasons, the Commission would not object on its own account to petitioners' request that a copy of the entire record be transmitted (by such time in October as checking the copy for completeness is finished), although we feel obliged again to note the size of the record (over 70,000 pages) in the event the Court wishes to direct an alternative disposition.

Sincerely,

/s/ Ernest J. Isenstadt
ERNEST J. ISENSTADT
Assistant General Counsel

cc: Thomas H. Clark, Esquire
Alfred Miller, Esquire
David A. Swankin, Esquire
David C. Murchison, Esquire
John R. Corne, Esquire
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HOWREY & SIMON
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October 11, 1983

Mr. William K. Slate, II
Clerk
United States Court of Appeals
for the Fourth Circuit
10th & Main Streets
Richmond, Virginia 23219-3599

Re: *Harry & Bryant Co. et al. v. FTC*, Nos. 82-
1850 (L)-82-1857, 82-1926, 83-1038

Dear Mr. Slate:

Pursuant to your letter of September 14, 1983, petitioners respectfully request that the Court direct the transmission of the entire record to the Court. As set forth in Mr. Isenstadt's letter of September 29, 1983, the Federal Trade Commission has now duplicated the record. As a result, many of the concerns raised in Mr. Isenstadt's letter of September 9, 1983 are no longer pertinent.

Sincerely,

/s/ David C. Murchison
DAVID C. MURCHISON, P.C.
Counsel for Petitioners
in Nos. 82-1850 (L)-
82-1857 and 82-1926

cc: Ernest J. Isenstadt, Esq.
Thomas H. Clark, Esq.
Alfred Miller, Esq.
H.A. Cole, Jr., Esq.
David A. Swankin, Esq.
Gary L. Sheets, Esq.

**Federal Statutes Providing for Judicial Review of
Administrative Action Under a Substantial Evidence
Standard**

1. 5 U.S.C. § 706 (1982) (Administrative Procedure Act)
2. 5 U.S.C. § 1508 (1982) (Government Organization and Employees Act)
3. 5 U.S.C. § 7123(c) (1982) (Civil Service Reform Act of 1978)
4. 5 U.S.C. § 7703(c) (3) (1982) (Civil Service Reform Act of 1978)
5. 7 U.S.C. § 136n(b) (1982) (Federal Environmental Pesticide Control Act of 1972)
6. 7 U.S.C.A. § 1446(d) (5) (C) (Supp. 1984) (Agricultural Act of 1949, as amended)
7. 7 U.S.C. § 2621(b) (2) (1982) (Potato Research and Promotion Act, as amended)
8. 7 U.S.C. § 2714(b) (2) (1982) (Egg Research and Consumer Information Act Amendments of 1980)
9. 7 U.S.C. § 4314(b) (2) (1982) (Floral Research and Consumer Information Act)
10. 12 U.S.C. § 93(b) (4) (1982) (National Bank Act, as amended)
11. 12 U.S.C. § 504(d) (1982) (Federal Reserve Act, as amended)
12. 12 U.S.C. § 505(4) (1982) (Federal Reserve Act, as amended)
13. 12 U.S.C. § 1464(d) (8) (B) (iv) (1982) (Home Owners' Loan Act, as amended)
14. 12 U.S.C. § 1730(k) (3) (D) (1982) (Savings and Loan Insurance Corporation Act, as amended)

15. 12 U.S.C. § 1730a(j)(4)(D) (1982) (Savings and Loan Holding Company Amendments of 1967, as amended)
16. 12 U.S.C. § 1786(j)(2) (1982) (Federal Credit Union Act, as amended)
17. 12 U.S.C. § 1818(i)(2)(iv) (1982) (Federal Deposit Insurance Corporation Act, as amended)
18. 12 U.S.C. § 1828(j)(3)(D) (1982) (Federal Deposit Insurance Corporation Act, as amended)
19. 12 U.S.C. § 1848 (1982) (Bank Holding Company Act of 1956, as amended)
20. 12 U.S.C. § 1972(2)(F)(iv) (1982) (Bank Holding Company Act Amendments of 1970, as amended)
21. 15 U.S.C. § 21(c) (1982) (Clayton Act, as amended)
22. 15 U.S.C. § 57a(e)(3) (1982) (Federal Trade Commission Act, as amended)
23. 15 U.S.C. § 78y(a)(4) (1982) (Securities Exchange Act of 1934, as amended)
24. 15 U.S.C. § 78y(b)(4) (1982) (Securities Exchange Act of 1934, as amended)
25. 15 U.S.C. § 79x(a) (1982) (Public Utility Holding Company Act, as amended)
26. 15 U.S.C. § 80a-42(a) (1980) (Investment Company Act of 1940, as amended)
27. 15 U.S.C. § 80b-13(a) (1982) (Investment Advisors Act of 1940, as amended)
28. 15 U.S.C. § 717r(b) (1982) (Natural Gas Act, as amended)
29. 15 U.S.C. § 1193(e)(3) (1982) (Flammable Fabrics Act, as amended)

30. 15 U.S.C. § 1262(e) (3) (C) (1982) (Child Protection and Toy Safety Act of 1969)
31. 15 U.S.C. § 1474(b) (3) (1982) (Poison Prevention Packaging Act of 1970)
32. 15 U.S.C. § 1710(a) (1982) (Housing and Urban Development Act of 1968)
33. 15 U.S.C. § 1825(b) (2) (1982) (Horse Protection Act of 1970, as amended)
34. 15 U.S.C. § 2004(a) (1982) (Energy Policy and Conservation Act)
35. 15 U.S.C. § 2008(e) (3) (B) (1982) (National Energy Conservation Policy Act)
36. 15 U.S.C. § 2060(c) (1982) (Consumer Product Safety Act, as amended)
37. 15 U.S.C. § 2082(c) (1) (B) (1982) (Emergency Interim Consumer Product Safety Standard Act of 1978)
38. 15 U.S.C. § 2618(c) (1) (1982) (Toxic Substances Control Act)
39. 15 U.S.C. § 3413(b) (4) (B) (1982) (Natural Gas Policy Act of 1978)
40. 15 U.S.C. § 3416(a) (4) and (b) (1982) (Natural Gas Policy Act of 1978)
41. 16 U.S.C. § 470ff(b) (1) (1982) (Archaeological Resources Protection Act of 1979)
42. 16 U.S.C. § 773f(b) (1982) (Northern Pacific Halibut Act of 1982)
43. 16 U.S.C. § 825l(b) (1982) (Federal Power Act, as amended)
44. 16 U.S.C. § 839f(e) (2) (1982) (Pacific Northwest Electric Power Planning and Conservation Act)

45. 16 U.S.C. § 1030(a)(2) (1982) (Northern Pacific Fisheries Act of 1954)
46. 16 U.S.C. § 1858(b) (1982) (Fishery Conservation and Management Act of 1976)
47. 16 U.S.C. § 2407(c) (1982) (Antarctic Conservation Act of 1978)
48. 16 U.S.C. § 3142(g)(2) (1982) (Alaska National Interest Lands Conservation Act)
49. 19 U.S.C. § 1516a(b)(1)(B) (1982) (Trade Agreements Act of 1979)
50. 19 U.S.C. § 1641(b) (1982) (Tariff Act of 1930, as amended)
51. 19 U.S.C. § 2395(b) (1982) (Trade Act of 1974, as amended)
52. 20 U.S.C. § 351d(f)(2) (1982) (Library Services and Construction Act, as amended)
53. 20 U.S.C. § 1070c-3(b)(2) (1982) (Education Amendments of 1972)
54. 20 U.S.C. § 1207(b) (1982) (Elementary and Secondary Education Act, as amended)
55. 20 U.S.C. § 1231b-2(b) (1982) (Education Amendments of 1974)
56. 20 U.S.C. § 1234d(c) (1982) (Education Amendments of 1978)
57. 20 U.S.C.A. § 1413(d)(3)(c) (Supp. 1984) (Education of the Handicapped Act, as amended)
58. 20 U.S.C.A. § 1416(b)(2) (Supp. 1984) (Education of the Handicapped Act, as amended)
59. 20 U.S.C. § 2309(d) (1982) (Education Amendments of 1976)
60. 20 U.S.C. § 2309(e)(2) (1982) (Education Amendments of 1976)

61. 20 U.S.C. § 2740(b)(4)(C) (1982) (Education Amendments of 1978)
62. 20 U.S.C. § 2851(b) (1982) (Education Amendments of 1978)
63. 20 U.S.C. § 3806(b)(4)(C) (1982) (Education Consolidation and Improvement Act of 1981)
64. 20 U.S.C. § 3862(h)(3) (1982) (Education Consolidation and Improvement Act of 1981)
65. 21 U.S.C. § 346a(i)(3) (1982) (Federal Food, Drug and Cosmetic Act, as amended)
66. 21 U.S.C. § 355(h) (1982) (Federal Food, Drug and Cosmetic Act, as amended)
67. 21 U.S.C. § 360g(c) (1982) (Federal Food, Drug and Cosmetic Act, as amended)
68. 21 U.S.C. § 371(f)(3) (1982) (Federal Food, Drug and Cosmetic Act, as amended)
69. 21 U.S.C. § 877 (1982) (Comprehensive Drug Abuse Prevention and Control Act of 1970)
70. 22 U.S.C. § 1631f(b) (1982) (International Claims Settlement Act of 1949, as amended)
71. 26 U.S.C. § 3310(b) (1982) (Employment Security Act, as amended)
72. 27 U.S.C. § 204(h) (1982) (Federal Alcohol Administration Act, as amended)
73. 29 U.S.C. § 160(e) (1982) (Labor Management Relations Act, as amended)
74. 29 U.S.C. § 160(f) (1982) (Labor Management Relations Act, as amended)
75. 29 U.S.C. § 210(a) (1982) (Fair Labor Standards Amendments of 1974)
76. 29 U.S.C. § 655(f) (1982) (Occupational Safety and Health Act of 1970)

77. 29 U.S.C. § 660(a) (1982) (Occupational Safety and Health Act of 1970)
78. 29 U.S.C. § 667(g) (1982) (Occupational Safety and Health Act of 1970)
79. 29 U.S.C. § 721(d) (3) (B) (1982) (Rehabilitation Act of 1973, as amended)
80. 29 U.S.C. § 1578(a) (3) (1982) (Job Training Partnership Act)
81. 29 U.S.C. § 1813(c) (1982) (Migrant and Seasonal Agricultural Worker Protection Act)
82. 29 U.S.C. § 1853(c) (1982) (Migrant and Seasonal Agricultural Worker Protection Act)
83. 30 U.S.C. § 816(a) (1) (Supp. V. 1981) (Federal Mine Safety and Health Act of 1977)
84. 30 U.S.C. § 818(b) (Supp. V. 1981) (Federal Mine Safety and Health Act of 1977)
85. 30 U.S.C. § 823(d) (2) (Supp. V. 1981) (Federal Mine Safety and Health Act of 1977)
86. 30 U.S.C. § 953(d) (1976) (Federal Mine Health and Safety Act of 1977)
87. 30 U.S.C. § 1276(b) (Supp. V. 1981) (Surface Mining Control and Reclamation Act of 1977)
88. 30 U.S.C. § 1462(b) (Supp. V. 1981) (Deep Seabed Hard Mineral Resources Act)
89. 31 U.S.C.A. § 755 (1983) (Money and Finance Act)
90. 31 U.S.C. § 1263(c) (1976) (State and Local Fiscal Assistance Act of 1972)
91. 31 U.S.C.A. § 6722(c) (1983) (Money and Finance Act)
92. 33 U.S.C. § 505 (1976) (Department of Transportation Act)

93. 33 U.S.C. § 520 (1976) (Department of Transportation Act)
94. 33 U.S.C. § 921(b)(3) (1976) (Longshoremen's and Harbor Workers' Compensation Act, as amended)
95. 33 U.S.C. § 1317(a)(2) (Supp. V. 1981) (Clean Water Act of 1977)
96. 39 U.S.C. § 404(b)(5) (1976) (Postal Reorganization Act, as amended)
97. 40 U.S.C. § 330(c) (1976) (Contract Work Hours Standards Act)
98. 40 U.S.C. § 333(d)(3) (1976) (Federal Construction Projects—Health and Safety Standards Act)
99. 41 U.S.C. § 321 (1976) (Wunderlich Act)
100. 41 U.S.C. § 609(b) (Supp. V. 1981) (Contract Disputes Act of 1978)
101. 42 U.S.C. § 263a(g)(3) (1976) (Partnership for Health Amendments of 1967)
102. 42 U.S.C. § 291h(b) (1976) (Hospital and Medical Facilities Amendments of 1964)
103. 42 U.S.C. § 405(g) (Supp. V. 1981) (Social Security Disability Amendments of 1980)
104. 42 U.S.C. § 504(b) (1976) (Employment Security Amendments of 1970)
105. 42 U.S.C. § 1316(a)(4) (1976) (Social Security Act, as amended)
106. 42 U.S.C. § 1320a-7a(d) (Supp. V. 1981) (Social Security Act, as amended)
107. 42 U.S.C. § 3027(e)(2) (Supp. V. 1981) (Comprehensive Older Americans Act Amendments of 1978)
108. 42 U.S.C. § 3785(b) (Supp. V. 1981) (Omnibus Crime Control and Safe Streets Act, as amended)

109. 42 U.S.C. § 5311(c)(3) (1976) (Housing and Community Development Act of 1974)
110. 42 U.S.C. § 6068 (1976) (Developmentally Disabled Assistance and Bill of Rights Act)
111. 42 U.S.C. § 6306(b)(2) (Supp. V. 1981) (National Energy Conservation Policy Act)
112. 42 U.S.C. § 6869(b) (Supp. V. 1981) (Energy Security Act)
113. 42 U.S.C. § 8412(c)(2) (Supp. V. 1981) (Power Plant and Industrial Fuel Use Act of 1978)
114. 42 U.S.C. § 9152(c)(2) (Supp. V. 1981) (Ocean Thermal Energy Conversion Act of 1980)
115. 43 U.S.C. § 1349(c)(6) (Supp. V. 1981) (Outer Continental Shelf Lands Act Amendment of 1978)
116. 49 U.S.C. § 1371(d)(7)(D)(ii) (Supp. V. 1981) (International Air Transportation Competition Act of 1979)
117. 49 U.S.C. § 1486(e) (1976) (Federal Aviation Act of 1958)
118. 49 U.S.C. § 1674b(b)(4)(B) (Supp. V. 1981) (Pipeline Safety Act of 1979)

Office - Supreme Court
FILED
JUN 27 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRY & BRYANT CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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QUESTION PRESENTED

Whether, in order to review the Federal Trade Commission's Trade Regulation Rule for Funeral Industry Practices, the court of appeals was required to have physical possession of the 70,000-page rulemaking record that was being retained and held for it at the Commission.



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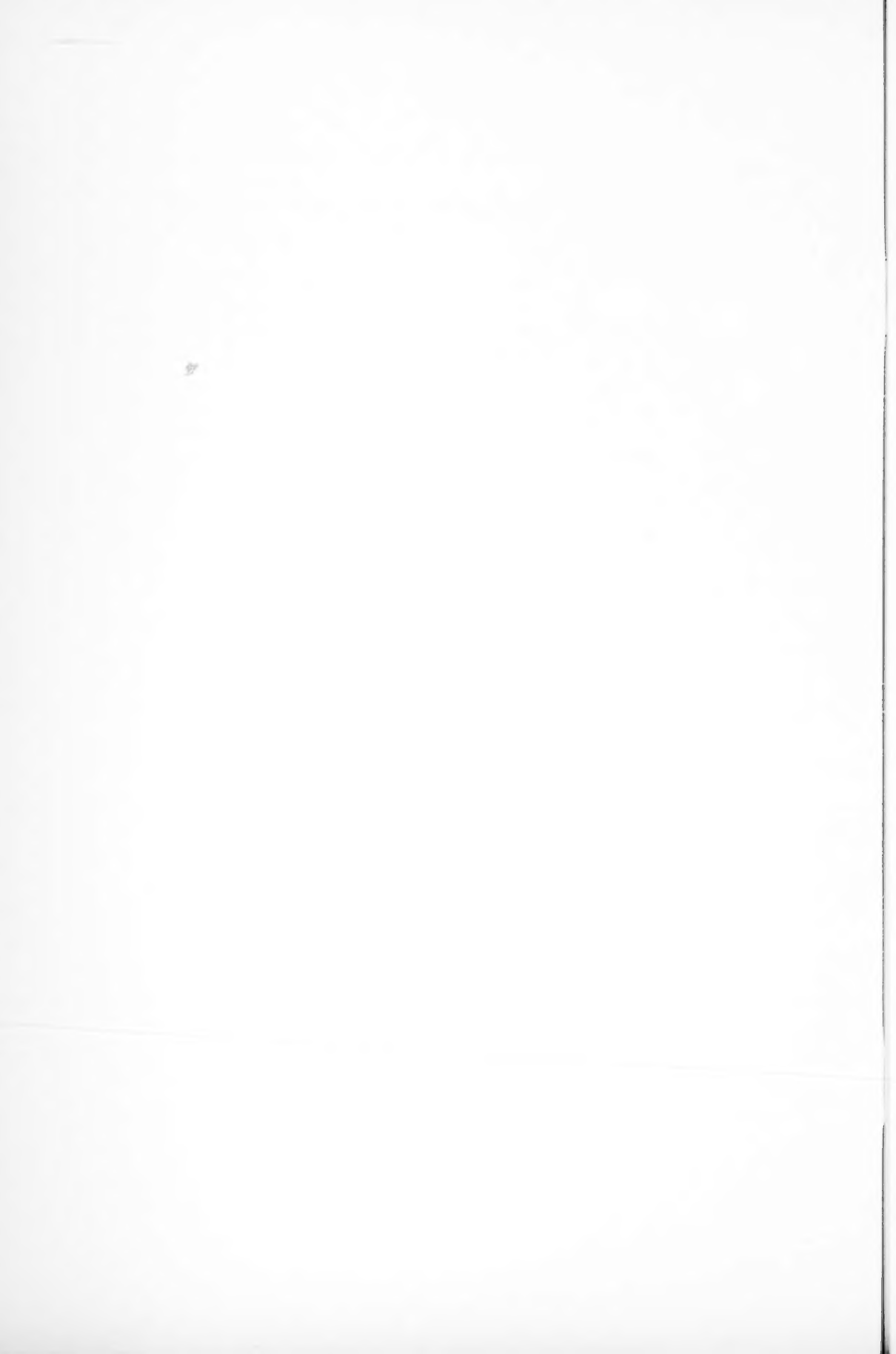
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1762

HARRY & BRYANT CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 726 F.2d 993. The Federal Trade Commission's Statement of Basis and Purpose accompanying its Trade Regulation Rule for Funeral Industry Practices is published at 47 Fed. Reg. 42260-42299 (1982).¹

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1984. A petition for rehearing was denied on March 1, 1984 (Pet. App. 19a-22a). The petition for a writ of certiorari was filed on April 30, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

¹Instead of printing the Statement of Basis and Purpose in their appendix (Sup. Ct. R. 21(k)(iii)), petitioners have lodged ten copies with the Clerk of the Court (Pet. 2 n.1).

STATUTE AND RULES INVOLVED

Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, is set forth at Pet. App. 39a-52a. Fed. R. App. P. 17(b) is set forth at Pet. 3 n.3. The Commission's Trade Regulation Rule for Funeral Industry Practices, 16 C.F.R. Pt. 453, is set forth at Pet. App. 23a-38a.

STATEMENT

Pursuant to Section 18 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 57a, the Federal Trade Commission promulgated a Trade Regulation Rule for Funeral Industry Practices. Section 18(a)(1) (15 U.S.C. 57a(a)(1)) authorizes the Commission to prescribe rules that (1) "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce within the meaning of section [5(a)(1)]" of the Act, 15 U.S.C. 45(a)(1), and (2) contain "requirements * * * for the purposes of preventing such acts or practices." Section 18 provides for a form of hybrid rulemaking that combines the informal rulemaking procedures of 5 U.S.C. 553 with oral hearings at which participants may cross-examine witnesses on disputed issues of material fact. 15 U.S.C. 57a(b)(1) and (c)(2). After a rule is promulgated, interested parties may petition a court of appeals for review under the standards of both the Administrative Procedure Act (5 U.S.C. 706(2)(A), (B), (C), and (D)) and Section 18(e) of the FTC Act, 15 U.S.C. 57a(e). The latter statute empowers the reviewing court to determine whether the rule is "supported by substantial evidence in the rulemaking record * * * taken as a whole." 15 U.S.C. 57a(e)(1) and (3).²

²Section 18(e)(5)(C) of the FTC Act, 15 U.S.C. 57a(e)(5)(C), specifies that 5 U.S.C. 706(2)(E) (review for substantial evidence) "shall not apply" to substantive rules promulgated under Section 18.

1. The Funeral Rule defines several unfair or deceptive practices in the sale of funeral goods and services and prescribes preventive requirements. After a rulemaking proceeding that produced a record in excess of 70,000 pages, the Commission concluded that certain practices engaged in by funeral providers were unfair or deceptive. See Pet. App. 23a-37a; 47 Fed. Reg. 42260, 42265-42271 (1982). To redress these practices the Rule requires that funeral providers: (1) give consumers a written list containing prices of funeral goods and services on an itemized basis before funeral arrangements are made (although providers are also free to quote package prices); (2) offer price information to consumers who telephone and ask about the terms, conditions, or prices for funeral services or goods; (3) obtain express permission from a family member or representative before embalming is performed, except under special circumstances; (4) refrain from requiring use of a casket for direct cremation; (5) refrain from specified misrepresentations; and (6) include several short disclosures on the price list to inform consumers of their legal rights and purchase options (Pet. App. 25a-37a).

2. The Commission first published notice of a proposal to adopt a funeral rule in August 1975 (see 47 Fed. Reg. at 42261). In response, it received some 9,000 comments and documents, covering approximately 20,000 pages. In 1976 an officer of the Commission presided over 52 days of hearings in six cities, at which 315 witnesses testified in support of or opposition to the proposed rule. Participants had ample opportunities to cross-examine witnesses and to submit documents to rebut materials that were placed in evidence at the hearings. See Pet. App. 5a-6a, 8a-9a; 47 Fed. Reg. at 42262, 42265 nn. 57-58, 42267 nn. 76-78; C.A. App. 280-410, 1145. These hearings generated an additional 14,700 pages of transcript and approximately 4,000 pages of exhibits (Pet. App. 6a).

In separate and extensive reports issued in 1977 and 1978, the presiding officer and Commission staff, respectively, recommended that the Commission adopt a rule regulating deceptive and unfair funeral industry practices (C.A. App. 935-1091, 1104-1663). In the ensuing comment period the Commission received more than 1300 additional written comments. After directly hearing oral presentations from several participants, the Commission unanimously voted to issue a funeral rule in March 1979. See Pet. App. 6a; 47 Fed. Reg. at 42262. The Commission, however, was subsequently required by Section 19 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 391-393, to reconsider, revise and republish the proposed rule, and to receive additional oral and written comments. In July 1981 the Commission again unanimously voted to issue the rule. See 47 Fed. Reg. at 42262-42263. It was not officially promulgated until September 24, 1982, after review by the Office of Management and Budget under 44 U.S.C. 3501 (see 47 Fed. Reg. at 42263). The accompanying Statement of Basis and Purpose contained an extensive and detailed discussion of evidence supporting the Rule and also directly addressed the arguments offered against the Rule (47 Fed. Reg. at 42263-42299; C.A. App. 5-41).

3. Petitions for appellate review of the Funeral Rule under Section 18(e) of the FTC Act, 15 U.S.C. 57a(e), were consolidated in the United States Court of Appeals for the Fourth Circuit. The Commission filed in that court a certified index of the record, and, as provided in 28 U.S.C. 2112(a) and Fed. R. App. P. 17(b), retained and held the record itself for transmission when and as required by the court. The index alone covered some 400 pages.³ Petitioners

³Briefing of the petitions was deferred while Congress reviewed the Funeral Rule under a legislative veto provision added to the FTC Act by Section 21 of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, which was later held unconstitutional in *Consumers Union, Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd*, No. 82-935 (July 6, 1983).

subsequently filed a joint appendix, which had been deferred pending the parties' initial exchange of briefs. The appendix contained 1900 pages and included 45 additional documents designated by petitioners to supplement their initial designations.

On September 8, 1983, one week after petitioners had filed their reply brief and the court of appeals had scheduled oral argument, petitioners requested that the Commission transmit to the court of appeals every document in the rulemaking record. They stated: "Because the petitions raise numerous questions concerning the adequacy of the record and the sufficiency of the evidence * * *, petitioners believe that the complete record should be before the Court" (Pet. App. 53a). The Commission replied that it "recognizes petitioners' right to request transfer of any or all parts of the record under Rule 17(b)," but "advise[d] the Court of the size of the record in the event the Court wishes to direct alternative treatment" (Pet. App. 55a). The total rulemaking record contained approximately 70,000 pages, which occupied 151 docket binders, spanned 50 feet of shelf space, and weighed approximately one-half ton (*id.* at 55a).⁴ The Commission offered to ship the record to the court in two weeks unless the court directed otherwise (*id.* at 56a).

⁴The record consists of two parts: (1) materials that formed the basis for the Rule, including documents submitted by Commission staff, and testimony, documents, and comments that were received during official comment periods; and (2) a separate "public record" category, consisting of materials and comments submitted to the Commission outside the comment periods, which were made available to the public but were not generally part of the basis for the Rule. See 16 C.F.R. 1.18(c); C.A. App. 929, 1136 n.53, 1146-1147. Petitioners' request for transmission of the record did not distinguish between these two categories.

Noting that under Fed. R. App. P. 17(b) the agency-retained portions of the record were still "a part of the record on review for all purposes," the court, through its clerk, advised the Commission to continue holding the record. Petitioners were authorized to renew their request after oral argument, at which time the court would decide "during the decisional and opinion drafting process, what part of the record, if any, it needs." Pet. App. 57a-58a. Petitioners renewed their request shortly after oral argument, but did not designate particular portions of the record they wished the court to examine (*id.* at 61a). The court did not request the Commission to supply additional portions of the record.

On January 12, 1984, the court of appeals issued a unanimous opinion rejecting all of petitioners' arguments and affirming the Funeral Rule in all respects (Pet. App. 1a-18a). Its opinion stated that the court had conducted "a careful review of the whole record" (*id.* at 18a), and the court's discussion of the substantial evidence supporting the rule expressly referred to surveys, comments, testimony, admissions by members of the funeral industry, and Commission findings in the record (*id.* at 13a-16a).

On petitions for rehearing, one of several issues raised by petitioners was the court's failure to require physical transmission of the entire record. Petitioners did not allege that they had been substantively prejudiced, nor did they point to specific portions of the record that the court of appeals should have examined. See 82-1850 Petition for Rehearing 7-9. Rehearing was denied without opinion.

ARGUMENT

The only question presented for review concerns the court of appeals' alleged failure to examine the rulemaking record "taken as a whole" because it did not have all 70,000 pages of the record physically at hand. Section 2112(a) of

the Judicial Code (28 U.S.C.) expressly authorizes rules providing that an agency may file a certified list in lieu of the actual record, and may "retain and hold [the record] for the court" and transmit it in whole or in part "when and as required by [the court]."⁵ Fed. R. App. P. 17(b) implements this provision and makes the parts of the record retained by the agency "a part of the record on review for all purposes." Thus the entire record retained and held by the Commission was available to and in the constructive possession of the court below, even though it was not physically transmitted to the clerk's office. Moreover, petitioners do not contend that the court of appeals failed to consider specific arguments or evidence because it did not have physical possession of the record.⁶ Accordingly, the court did not depart from the accepted course of judicial review. No question of general public importance is presented by the petition, and it should be denied.

⁵The relevant portion of 28 U.S.C. 2112(a) provides:

Such rules may authorize the agency * * * to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court.

⁶The court of appeals held that the Commission's Funeral Rule satisfied the standards for judicial review set forth in Section 18(e) of the FTC Act. Petitioners do not directly ask this Court to review the finding that the Rule was supported by "substantial evidence." They apparently have limited their petition in light of the "familiar rule" that this Court "will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied' by the court below." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981) (brackets in original) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

Petitioners' contention (Pet. 10) that they had an absolute right under Fed. R. App. 17(b) to have the entire record physically transferred to the court of appeals is insubstantial. The Commission fulfilled its obligation by promptly offering to ship all 70,000 pages to the court. But whether the court needed to have physical possession of the entire record was, under 28 U.S.C. 2112(a) and Rule 17(b), a matter for the court to determine in its discretion as dictated by the needs of judicial review. Storing a record of this size would have imposed a substantial burden on the court. Petitioners never attempted to justify this burden by specifying any additional portions of the record not included in the joint appendix that they believed the court should examine. Nor have petitioners attempted to explain how possession of the entire record would have affected the court's decision. Section 2112 was intended to prevent precisely such unnecessary and burdensome impositions on courts, agencies and parties.⁷

Petitioners also contend (Pet. 9) that the court of appeals must have failed to review the rulemaking record "taken as a whole," as required by Section 18(e) of the FTC Act, because it did not have the entire record physically available in the clerk's office. Petitioners confuse the standard of review with the process for conducting that review.

Review on the "whole record" requires a court to consider both the evidence supporting an agency's finding and also any contradictory evidence that "fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-488 (1951). Professor Davis has articulated this summary of the "whole record" requirement:

⁷The legislative history of 28 U.S.C. 2112 shows Congress's expectation that parties would request transmission of the entire record only where it was genuinely necessary for judicial review. S. Rep. 2129, 85th Cong., 2d Sess. 2, 4 (1958).

The reviewing court must take into account whatever detracts from evidence it holds to be substantial, *but this is not the same as saying that every page must be read*. One party normally points out the evidence supporting the finding and the other normally points out the evidence detracting from the finding; by relying on the parties' sifting the judges may often review quite conscientiously without reading the entire record.

4 Davis, *Administrative Law Treatise* § 29.03, at 130 (1958) (emphasis added).⁸

This is precisely the process followed here, and the court below thus complied with the requirements for review of the record "taken as a whole." Under 28 U.S.C. 2112(a) and Fed. R. App. P. 17(b), the court had constructive possession of the whole record. It also had before it a 400-page certified index and 1900 pages from the record that the parties had designated for the joint appendix after they had narrowed the issues by exchange of briefs, including 165 pages of briefs on petitioners' side. Moreover, the court expressly stated that it had undertaken "a careful review of the whole record" (Pet. App. 18a), and its opinion took note of the parties' arguments and of the evidence in the record that had been cited to it. The court was not required to go

⁸Professor Davis supported his conclusion by quoting Justice Black's response at oral argument to a suggestion that review on the "whole record" requires judges to read the entire record. See 4 Davis, *supra*, at 130-131 n.17. See also *Sierra Club v. Costle*, 657 F.2d 298, 410 n.540 (D.C. Cir. 1981), quoting Rodgers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision*, 11 *Env'tl. L.* 301 (1981): "'Few practitioners believe that judges read, much less studiously follow, the monstrous records thrust before them.'"

beyond this and read every document in the record. Accordingly, it would be pointless to require that the court nonetheless take physical possession of the entire record.⁹

Petitioners had the responsibility of pointing out to the court of appeals what additional evidence, if any, the court should have examined. They did not do so. Thus the court below did not depart from the norms of judicial review by declining to accept petitioners' request that it undertake its own search through this enormous record for possibly contradictory evidence. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 379-380 (D.C. Cir. 1981) ("[I]t is not reasonable * * * to expect the court on its own to gather together all of the scattered pieces of information that are necessary to make a coherent whole".)

⁹There is no basis to petitioners' assertion (Pet. 10) that the court "never * * * reviewed or consulted the record." To the contrary, their claims that the Fourth Circuit "ignored" that record (Pet. 8, 10, 13) are merely reiterations of their position that the court was obliged to take physical possession of, and examine, every document in the Commission's rulemaking record.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 83-1762

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ALEXANDER L. STEVAS

CLERK

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On Petition for a Writ of Certiorari to the United States
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PETITIONERS' REPLY BRIEF

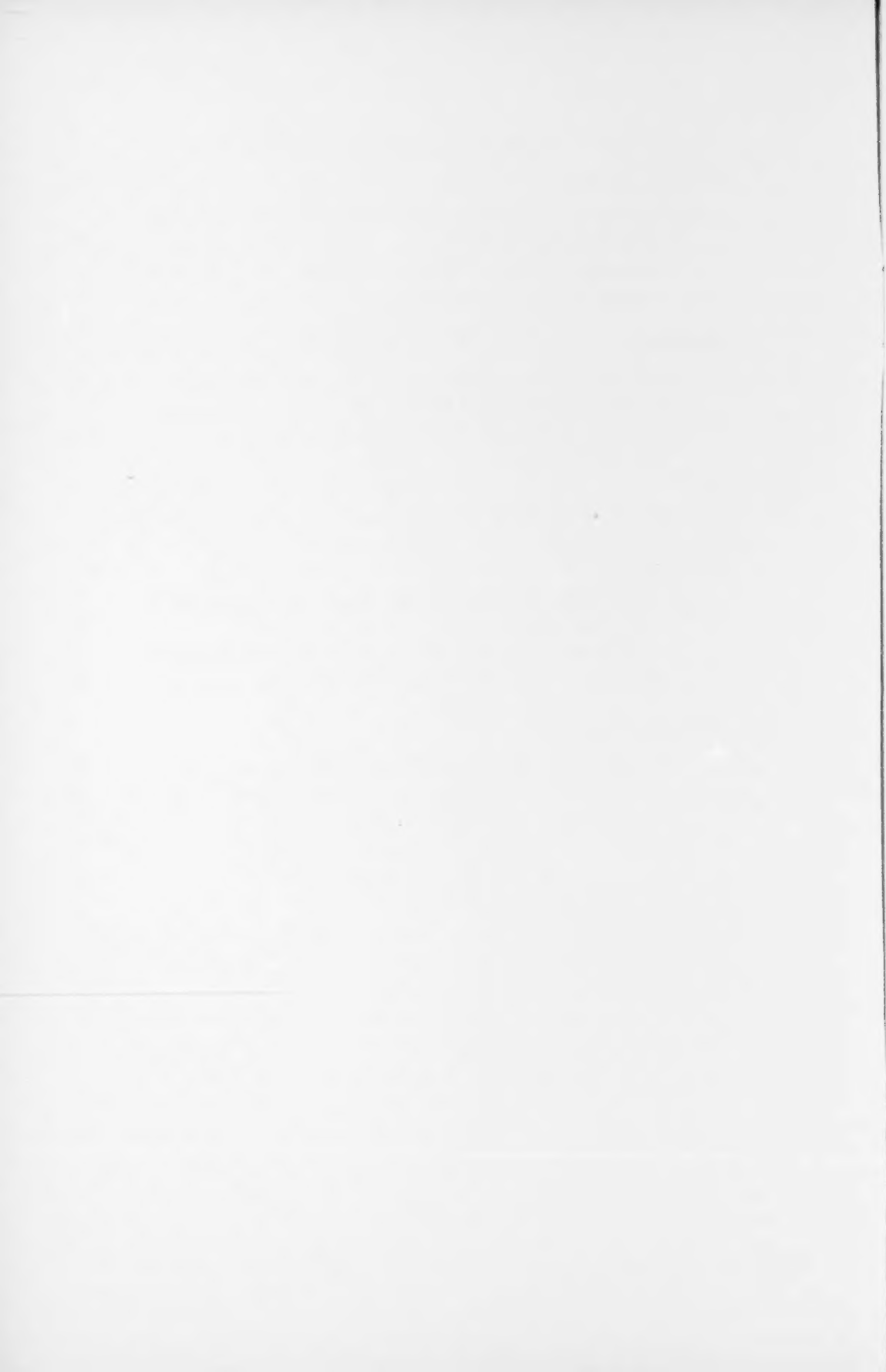
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PETITIONERS' REPLY BRIEF

In opposing the petition, the FTC misstates or misconceives the question presented. The issue is not, as the FTC erroneously suggests, whether in reviewing the decision of an administrative agency, a Court of Appeals must have the entire administrative record in its physical possession or whether it must read every single page in that record. Instead, the issue is whether a Court of Appeals can properly conclude that an agency rule is supported by substantial evidence in the record when it did not review—and could not have reviewed—the disputed evidence cited by the parties because the administrative record was never transmitted to the court despite

petitioners' requests that this be done in accordance with Rule 17(b) of the Federal Rules of Appellate Procedure.

The FTC acknowledges, as it must, that judicial review of administrative rulemaking under a "substantial evidence" standard requires a court to consider both the evidence supporting an agency's factual findings and also any contradictory evidence that "fairly detracts from its weight." FTC Br. at 8, citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-488 (1951). Likewise, the FTC recognizes that in conducting such a review, the court must examine the record evidence relied upon by the parties. FTC Br. at 9, citing 4 K. Davis, *Administrative Law Treatise* § 29.03 at 130 (1st ed. 1958). See also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("searching and careful" review of record).

Contrary to the FTC's assertion, however, this was not the process that was followed below. The Court of Appeals did *not* review the evidence cited by the parties because that evidence remained at the FTC offices in Washington despite requests by petitioners that it be transmitted to the Court of Appeals in Richmond. Under the circumstances, the Court of Appeals could not have conducted the type of review required by statute, and the court's action represents such a drastic departure from accepted judicial practice that summary reversal is appropriate.¹ The integrity of the judicial process demands no lesser remedy when, as here, the Court of Appeals has erroneously stated that "after a careful re-

¹ In this case, the pertinent statute was the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 57a (1982). However, this is only one of many statutes which provide for judicial review of agency determinations on a substantial evidence standard. See Pet. at 11 n.10; Pet. App. 62a-69a. The FTC does not seriously dispute that the issue presented is of central importance to the effectiveness of the congressional scheme for judicial oversight of the federal administrative process that is reflected in these statutes. See Pet. 11-13.

view of the whole record we conclude that petitioners' challenges to the Funeral Rule are without merit." (Pet. App. 18a.)

Petitioners contended below that the FTC's Funeral Rule was not supported by substantial evidence in the rulemaking record. Within the limitations of an appellate brief, petitioners analyzed in detail the inadequacy of the record evidence relied upon by the FTC, as well as the importance of the contrary evidence ignored or downplayed by the FTC.² For example, petitioners demonstrated the fundamental methodological deficiencies which completely undermined the validity of the hodgepodge of "survey" evidence on which the FTC relied to support virtually every aspect of the Rule.³ Petitioners also showed by examples that the non-survey evidence relied upon by the FTC was sporadic and anecdotal and did not justify an industry-wide rule predicated upon the existence of unfair or deceptive practices throughout the entire funeral industry.⁴ Significantly, petitioners then showed that the record evidence did not support the fundamental factual assumptions on which the Rule was based, *e.g.*, that consumers are unable to make informed choices, that price information is unavailable to consumers, and that the failure to itemize prices in the detailed manner required by the Rule leads to higher prices or the purchase of unwanted items.⁵

Due to the bulk of the record and the fact that the FTC's lengthy Statement of Basis and Purpose supporting the Rule, 47 Fed. Reg. 42,260-42,304 (1982) (copies previously lodged with the Clerk of this Court), contains

² For the convenience of the Court, petitioners have lodged 10 copies of their briefs in the Court of Appeals with the Clerk of this Court.

³ C.A. Br. 25-33; C.A. Reply Br. 12-14.

⁴ C.A. Br. 33-35; C.A. Reply Br. 14-15.

⁵ C.A. Br. 37-42, 42-44, 48-53; C.A. Reply Br. 15-16, 17-19.

literally thousands of unanalyzed citations to the record, petitioners were not able to designate more than a fraction of such evidence for inclusion in the joint appendix. To do so would have required that all, or most, of the administrative record be included.⁶ Rather, pursuant to Rule 17(b) of the Rules of Appellate Procedure, petitioners sought to exercise their right to have the record transmitted to the Court of Appeals for its review. As the FTC admits, the Court of Appeals refused to do so. Accordingly, the Court did not and could not analyze the disputed evidence in the record.

In opposing the petition, the FTC completely ignores the pertinent language of Rule 17(b) of the Federal Rules of Appellate Procedure which, as the FTC recognized before the Court of Appeals, gives petitioners the *right* to have the record transmitted to the Court of Appeals. See Pet. App. 55a. The Rule explicitly states that upon the request of a party, "the record or any part thereof . . . *shall be transmitted* to the court. . . ." (emphasis added). See also 28 U.S.C. § 2112(b) (1982) ("The agency . . . if so requested by the petitioner for review . . . *shall*, file in the court the entire record of the proceedings before it *without abbreviation*.") (emphasis added). The Court of Appeals ignored these provisions and effectively blocked petitioners' efforts to have the record transmitted.

In a feeble attempt to justify this inexcusable departure from established practice, the FTC here relies on those portions of 28 U.S.C. § 2112(a) (1982) and Rule

⁶ Thus, the joint appendix consisted principally of non-evidentiary material such as the 165-page report of the presiding officer (C.A. App. 935-1100), or the 580-page staff report (C.A. App. 1101-1679), or various pleadings, rulings and transcript references which related to procedural issues raised on appeal. Accordingly, the FTC's suggestion that the Court of Appeals adequately reviewed the evidence in a 70,000-page record because it had possession of the 1,900-page joint appendix and a certified index of the record is disingenuous at best.

17(b) which deal with the composition of the administrative record on appeal and provide only that material retained by the agency remains a part of the record for purposes of review. The purpose of these provisions is not, as the FTC implies, to permit the Court of Appeals to refuse to review the administrative record or to refuse the request of a party to have that record transmitted to the court. Rather, these provisions simply seek to insure that the entire administrative record remains a part of the record for purposes of review so that it is available for transmission to the Court of Appeals when requested by a party.⁷

The FTC's attempt to convert petitioners' claim into an argument that every page of the administrative record must be reviewed whether or not it is relevant to the issues on appeal is a transparent effort to divert the Court's attention from the Court of Appeals' complete failure to examine relevant portions of the record. Had the Court of Appeals examined the evidence in question, it would not have upheld the Funeral Rule, as promulgated, as supported by substantial evidence in the record.⁸

⁷ As Professor Moore states, Rule 17 provides

that when less than the entire record is transmitted to the court of appeals, either through stipulation or through the election of the agency to file a list in lieu of the record, the parts that are not transmitted to the court of appeals remain part of the record on review *and must be transmitted at the request of any party* or the court, despite any stipulation.

⁹ J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice*, ¶ 217.02[3] at 17-5 (2d ed. 1982) (emphasis added).

⁸ Contrary to the FTC's claim (FTC Br. at 7), petitioners emphatically contend that the Court of Appeals failed to consider the evidence in dispute. The FTC's related suggestion that the petition should be denied because petitioners allegedly failed to direct the Court's attention to the evidence which they contend the Court should have examined is also without merit. Petitioners' briefs dealt with such evidence in detail, providing record citations to

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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a variety of surveys, testimony and other material relied on by the FTC. Had the record been transmitted to the Court of Appeals, it would have been a simple matter for the Court to review the specific items identified. This is not a case where a petitioner simply raises a general question as to the substantiality of the record evidence and leaves the Court to undertake its own search through the record.